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MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE ELEVENTH;

BEING

A REPORT OF CASES argued and adjudged in THE COURT OF KING'S BENCH,
in the Time of QUEEN ANNE, viz. from THE FIRST to THE EIGHTH
Year of her Reign; during which Time the late LORD CHIEF JUSTICE
HOLT presided in that Court.—To which are now added, SELECT CASES
in the KING'S BENCH, from Trinity Term in the Fourth Year of
GEORGE THE FIRST, to Michaelmas Term in the Fourth Year of
GEORGE THE SECOND.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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MODERN REPORTS

STREET CASES

THE COURT

OF THE

CHANCERY

AND



BY

THE

PRINTERS

AT THE

PRINTING

OFFICE

OF THE

COURT

OF CHANCERY

THE
P R E F A C E.

THE EDITOR of this Report begs leave to offer a few words, FIRST, as to the Contents of the Work; and, SECONDLY, of the Motive or Cause of its Publication.

FIRST, The former of these may, in general, be seen in THE TITLE PAGE, and in THE TABLE at the end. But as the title page imports "CASES ARGUED, DEBATED, " AND ADJUDGED IN THE COURT OF KING'S BENCH" only, it may be necessary here to inform the Reader, that some few cases will herein be also found which were argued and adjudged in the Court of Common Pleas; of this kind are those of *Arthur v. Bokenham* (a) and *Abbot v. Burton* (b).

SECONDLY, The Motive or Cause of its Publication was chiefly to supply a *lacuna* or chasm, that at present appears in our printed Reports; for the Editor hereof observing, that *Faresley*, and the *Sixth Modern*, &c. proceed no farther

(a) Page 148 to 163.

(b) Page 181, &c.

THE PREFACE.

than the end of the third year of QUEEN ANNE; and that "*Cases in Law and Equity*" begin with the ninth of the same Queen, and consequently that there was a *vacuum* of at least five years; he could not but apprehend it might be of some use and benefit to his profession, to publish such Cases as had occurred in the Court of King's Bench during that *interstitium*, which ends with the death of SIR JOHN HOLT, *Knt.* late Lord Chief Justice of that Court.

And as in preparing of this Work, the Editor found certain Cases of excellent learning argued and adjudged in the Court of Common Pleas, as is before observed, he thought himself obliged to communicate those also to the public.

Nor are the other Cases herein contained, which *prima facie* may seem of small import, to be for that cause totally rejected; for, as the Lord Chief Justice COKE long since observed, "there is no Case in the Law, however immaterial or insignificant it may at first sight appear, but some time or other will stand a studious Reader and diligent Practiser in good stead."

To such Readers, to such Practisers, is this Report recommended.

Middle-Temple.

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EASTER

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John A. Smith", "Mary E. Jones", and "Robert L. Brown".

E A S T E R T E R M,

The First of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

* NOTE, In this and some succeeding Terms the following Opinions were *obiter* delivered by the Court of King's Bench.

* [1]

Anonymous.

Case 1.

HOLT, *Chief Justice.* When a trial has been twice had on the same issue, and both verdicts agree, it would be unreasonable to grant a new trial.

No new trial after two concurring verdicts.

6. Mod. 22.

1. Stra. 692. 2. Salk. 649. 2. Bl. Rep. 963. Tidd's Pract. 604.

Anonymous.

Case 2.

IF A SHERIFF return a jury contrary to a rule of court, or commit any such irregularity, to the prejudice of either party, it may be a good cause to set aside the verdict, &c. But when no material cause can be shewn, this Court will always have too great an esteem for a verdict, to grant a new trial.

Misconduct of the sheriff in returning the jury, a ground for a new trial.

Tidd's Pract. 607.

Easter Term; 1. Queen Anne, In B. R.

Cafe 3.

Anonymous.

The unavoidable absence of a material witness ground for a new trial.

Sayer, 27.

2. Salk. 645.

6. Mod. 22. Tidd's Pract. 606. Sellon's Pract. 512.

WHEN any unforeseen accident happens, or some sudden impediment, as sickness, &c. to a witness; and a trial is had; and a verdict given for the plaintiff, which might have been given for the defendant, had that witness been produced; in such cases this Court will grant a new trial, on paying the costs of the former trial.

Cafe 4.

Anonymous.

The Court will not easily grant a new trial after a view.

1. Burr. 253.

WHERE A TRIAL is had upon a view (a), this Court will not easily be induced to grant a new one; for the view is supposed to govern the jury more than the evidence at the trial; and therefore, in such cases, there ought to be some great irregularity in the jury, to obtain a new trial.

(a) See the statute 4. & 5. Anne, c. 16. l. 3. 3. Geo. 2. c. 25. l. 14.

* [2]

Cafe 5.

* Anonymous.

A bond shall be presumed paid after twenty years.

6. Mod. 22.

Cases in Law and Equity, 273.

Chan. C. 102, &c.

WHERE A BOND for payment of money has lain dormant twenty years, if an action be brought thereon, and the defendant plead *solvit ad diem*;

HOLT, Chief Justice, said, This will be a good plea, &c. for it is a strong presumption that the bond has been satisfied, where there has been no demand made, nor action brought thereon in so long a time (a).

(a) See *Serie v. Barrington*, 3. Mod.

279. *S. C.* 2. *Stra.* 326. *S. C.* 3. *Ld.*

Ray. 1370. *Anonymous*, 6. Mod. 22.

Humfrey v. Humfrey, 3. Peer. Wms.

397. *Rex v. Stephens*, 1. Burr. 434.

Winchelsea Cases, 4. Burr. 1963. *Of-*

wald and Others, Executors of Oswald,

v. Leigh, 1. Term Rep. 270.

Cafe 6.

Anonymous.

Bail on error, bond to pay, &c.

BY THE STATUTE 3. Jac. 1. c. 8. when a writ of error is brought on a judgment had upon a bond to pay money, there special bail ought to be given (a).

(a) See *Bull v. Clifton*, post. 260.

Garrett v. Dandy, 1. Show. 15. *Pett*

v. Conry, 1. *Stia.* 476. *Scott v. Brace,*

6. Mod. 38. *Thrale v. Vaughan*, 2.

Stia. 1190. *Chauvet and Another v.*

Almay, 2. Burr. 746.

Anonymous.

Easter Term, 1. Queen Anne, In B. R.

Anonymous.

Case 7.

AFTER A YEAR a *scire facias* ought to precede the *levari*, or *feri facias* (a). Judgment must be revived by *scire facias*.

(a) See 1. Stra. 100. 301. Barnes, 2. Inst. 471. 2. Leon. 77. 1. Sid. 59. 197. 6. Mod. 14. Co. Lit. 290. 1. Keb. 199. Tidd's Practice, 720.

Anonymous.

Case 8.

IF ONE who has become bail, has a warrant of attorney to indemnify him, yet he cannot enter it up, and take out execution upon it, until some process is gone out upon the bail-bond whereby he has an injury done him (a). Bail cannot enter judgment on a warrant of attorney, until damnified on the bail-bond.

(a) See *Touffaint v. Martinant*, 2. Term Rep. 100. *Martin v. Court*, 2. Term Rep. 640.

Anonymous.

Case 9.

NOTICE OF BAIL (on an arrest, &c.) ought to be not only by a note given of the parties names who are to be bail, but also of their addition, trade, substance, and place of abode (a); that they may be more easily inquired after by the plaintiff or his attorney. Form of notice of bail. *Impey*, 124. *Loft*, 237. 6. Mod. 24. Tidd's Pract.

134. *Séillon's Pract.* 158.

(a) The notice of bail must be also properly inserted, *Loft*, 237. and in describing their place of abode, it is not sufficient to state the parish or town, but the very street or other place in which they reside must be precisely stated. Anonymous, Michaelmas Term, B. R. 25. *Geo.* 3.

Anonymous.

Case 10.

WHEN THE SUIT is by original writ, the statute of 18. *Eliz.* c. 14. will not help a bad writ (original) (a); but otherwise where the suit is by *mesne process*, as bill of *Middlesex*, *latitat*, &c. (b). For the difference herein between trespass, and trespass on the case, see *Hob.* 180. 2. *Crò.* 542. A bad original is not helped by 18. *Eliz.* c. 14. 5. Co. 37. *Crò. Eliz.* 722. 1. Sid. 34.

2. *Ld. Ray.* 1209. Tidd's Pract. 621.

(a) But the want of an original is aided from the misprision of the clerk, 8. Co. by verdict, 5. Co. 37. *Crò. Eliz.* 722. 159. *Gilb. C.P.* 117. Barnes, 10. 16. 22. and by 8. *Hen.* 6. c. 12. the Court will (b) The want of a bill on the file is aided by the statute. *Hob.* 130.

Anonymous.

Case 11.

AN IMPARLANCE ought not to be granted, unless it be prayed or asked by the party (a). Imparlance: *Nil dicit*.

(a) *Cem. Dig.* "Pleader" (D. 1.). 2. Mod. 62. 2. *Show.* 310.; and Rule of Easter Term, 5. *Ann.*

Easter Term, 1. Queen Anne, In B. R.

Case 12.

Anonymous.

ON a *nil dicit* judgment is to be given *instante*.

Case 13.

Anonymous.

Plea in abatement must be within four days.

PLEAS IN ABATEMENT must be within four full days in Term; for if a declaration be given four days before the end of a Term, the defendant cannot plead in abatement the next Term (a); nor will a plea in abatement be allowed ordinarily after a general imparlance (b).

(a) See the Rule made in Trinity Term 5. & 6. Geo. 2. and Tidd's Pract. 243 to 245. Long v. Miller, 1. Wils. 23. Jennings v. Webb, 1. Term Rep. 278. Smith v. Miller, 3. Term Rep. 627. Doughty v. Lafcelles, 4. Term Rep. 520. Harbord v. Perigal, 5. Term Rep. 210.

(b) 4. Bac. Abr. 29. Gilb. C. P. 184. 1. Bl. Rep. 1. Wils. 261. But after a special imparlance, the defendant may plead in abatement, 1. Lutw. 6. 1. Bl. Rep. 51. 1. Wils. 261. 12. Mod. 529. 5. Mod. 353. 1. Burr. 59.

Case 14.

Anonymous.

A bad plea cannot be taken advantage of after issue thereon and verdict.

IF A. put in an ill plea, and B. join issue upon it, and a verdict is given against B. now shall B. never take advantage of A.'s bad plea, having slipt his opportunity of demurring to it: but it may be aided by the statute of *Jeofails*.

* [3]

Case 15.

* Anonymous.

Arrest of judgment.

Sellon's Pract. 521.

BEFORE ONE moves in arrest of judgment, THE POSTEA ought to be in court, and delivered to the clerk in court (a); and after it is so brought in, the Counsel have four days to move in arrest of judgment (b).

(a) See Wood v. Shepherd, 6. Mod. 24. S. C. 1. Salk. 78. S. C. Holt, 71. 5. Com. Dig. "Pleader" (S. 47.). Rex v. Franklin, cited by Mr. J. Buller in Rex v. Perry, 5. Term Rep. 454.

(b) The motion in arrest of judgment may be made at any time before judgment is pronounced, Rex v. Hayes, 2. Stra. 845. Taylor v. Whitbread, Dougl. 746. Rex v. Holt, 5. Term Rep. 436.

Case 16.

Anonymous.

Postea not to be altered after it is filed.

THE COURT will not grant a rule to alter or amend A POSTEA (a) after it is returned and filed.—*Quere*, If not frequently done, if in the same Term it is filed.

(a) In what cases the *postea* may or may not be amended, see Tidd's Pract. 455. 590. Dougl. 376. 722. 1. Term Rep. 542.

Anonymous.

Easter-Term, 1. Queen Anne, In B. R.

Anonymous.

Case 17.

THE COURT will not incline to grant a *certiorari* to the justices of peace when a person is convicted; but the justices ought to give judgment; for a *certiorari* to justices is rather to aid them when a man would creep out of their jurisdiction, and so to bring him into this court, which has a more extensive power to punish him (a). 2.

Certiorari does not lie on the part of a defendant without special cause.

(a) Rex v. Fawle, Ld. Ray. 1452. Rex v. Warminster, Stra. 470. Rex v. Harman, And. 343. Rex v. Holbourn, 3. Burr. 1458. Rex v. Mayor of Liverpool, 4. Burr. 2244. Rex v. Lewis, 4. Burr. 2456. Rex v. Bodenham, Cowp. 78. Rex v. Ducheſs of Kingston, Cowp. 283. Rex v. Abbott, Dougl. 553. *notis.* Zinck v. Langton, Dougl. 749. 752. Rex v. Eaton, Dougl. 751. *notis.* 2. Term Rep. 89. Rex v. Jenkinson, 1. Term Rep. 82. Rex v. Sparrow, 2. Term Rep. 196. *notis.* Rex v. Griffith, 3. Term Rep. 658. Rex v. Stannard, 4. Term Rep. 161. Rex v. Brown, 5. Term Rep. 156. Rex v. Bass, 5. Term Rep. 251. Rex v. Hube, 5. Term Rep. 542.

Anonymous.

Case 18.

A MOTION to quash a writ taken out by the party himself, is not grantable of course, but some sufficient cause ought to be shewn to the Court.

A party cannot quash his own writ without cause.

Anonymous.

Case 19.

IT is not necessary against a *wrong-doer* to set forth any title; i. e. whether by prescription or otherwise; especially where the action is grounded on the possession (a).

Title need not be stated against a *wrong-doer*.

(a) Dent v. Oliver, Cro. Jac. 43. 123. Stroud v. Birt, 4. Mod. 423. Comy. 7. St. John v. Moody, 1. Vent. 275. Blockley v. Slater, 3. Lev. 266. Ashley v. Frickleton, 3. Lev. 73. Waring v. Griffith, 1. Burr. 440. Cary v. Bacchus, 1. Show. 19. Palmer v. Kebblethwaite, 1. Show. 64. Stocks v. Booth, 1. Term Rep. 428. Rogers v. Brooks, 1. Term Rep. 431. *notis.* Clarke v. King, 3. Term Rep. 147. Rider v. Smith, 3. Term Rep. 766. Grimstead v. Marlow, 4. Term Rep. 718. Griffith v. Mathews, 5. Term Rep. 297.

Anonymous.

Case 20.

THE WORD, "*scienter*" was held necessary to be inserted in an indictment of forgery (a). 2.

"*Scienter*" necessary in forgery.

(a) Rex v. Loggan, Stra. 75. Rex v. Lawley, Stra. 904. Rex v. Bruce, Andr. 162.

Anonymous.

Case 21.

BEFORE a hawker, pedlar, or the like, can be deemed a *va-grant*, he must be wandering abroad and out of his own parish (a).

(a) See 29. Geo. 3. c. 26. Rex v. Little, 1. Burr. 609. Rex v. Redfearne, 4. Term Rep. 273.

Easter Term, 1. Queen Anne, In B. R.

Case 22.

Anonymous.

A prisoner cannot be retaken on an escape, if the plaintiff has discharged him.

2. Inst. 382.
Dyer, 275. in marg.
Stiles, 117.
2. Term Rep. 126.

IF A PRISONER make a negligent escape, and afterwards, upon an agreement between him and the plaintiff at whose suit he is in execution, the plaintiff discharges him, the marshal or gaoler cannot take him (a); for the retaking him, and rendering him to the county-gaol upon the statute 1. Ann. stat. 2. c. 6. (b) is only a shifting of the gaol, and is wholly founded upon the original process, and only a continuation thereof.

POWELL, Justice, put this case: Suppose the marshal suffers an escape, and then by virtue of the statute 1. Anne, c. 6. the plaintiff, by a Judge's warrant, retakes him, whether an action for the escape lies against the marshal?

To which THE COURT gave no answer,

(a) See Buxton v. Home, 1. Show. 174. Phillips v. Stone, 2. Leon. 118, 119. Scott v. Peacock, 1. Salk. 271. Anonymous, Stra. 423. and the case of Willing v. Goad, that if a prisoner make a negligent escape, and during his absence the plaintiff sends a discharge of his debtor to the marshal, the marshal cannot either retake him for his fees, or

detain him on a declaration delivered for having contrived the escape of another prisoner; for the plaintiff being satisfied, the retaking is illegal, 2. Stra. 909. Nor can the sheriff retake a prisoner after a voluntary escape, Atkinson v. Jameson, 5. Term Rep. 25.

(b) See 5. Ann. c. 9.

* [4]

Case 23.

Anonymous.

In what manner a prisoner in the actual custody of the marshal may be charged with a new suit in Vacation time.

IF A PERSON is in the custody of the marshal at the suit of A; and B. in the Vacation-time, would charge * him there; *quare*, how it must be done; for arrest him he cannot, because he is already in custody; and file a bill, THE CLERK said, he could not do in the Vacation, nor deliver a declaration but in Term-time; so that unless a *remanet in custodia*, entered in the marshal's book, should be a charge sufficient to ground an escape upon, the party would be without remedy:

And so for the necessity, the better opinion of THE COURT seemed to be, that it was a good charge (a).

(a) See Tilsden v. Parfriman, 6. Mod. 254. 1. Salk. 213. 345. 3. Salk. 150. But in the case of Hutchins. v. Kenrick, 2. Burr. 1048. the court of king's bench were of opinion, that the right method to charge a prisoner with a new suit, in Vacation-time, is to file a bill as of the preceding Term, and then to deliver to, or leave for the defendant, being in custody, a copy of the declaration as of the preceding Term; and then to make an affidavit thereof. But by a rule made in Easter Term, 5. Will. & Mary, an affidavit of the delivering of the declaration seems, in this case, unnecessary. For preventing, however, the detainer of prisoners, charged by declaration, in the custody of the marshal, when the cause of action does not amount to ten pounds.

a rule was made in Easter Term, 15. Geo 2. "that no declaration shall be sufficient cause of detaining such prisoner in custody, unless an affidavit that the plaintiff's cause of action against him does amount to ten pounds or upwards, shall be first made and filed with the clerk of the rules, and the sum specified in such affidavit indorsed by him on such declaration, before the same is left with the turnkey."—Tidd's Practice, 197. But this rule is confined to cases where the prisoner is charged with a new action, and does not apply where he is proceeded against by the same plaintiff, for the cause of action expressed in the process. Barnes, 75, Pract. Reg. 330.

Then

Easter Term, 1. Queen Anne, In B. R.

Then a question arose, What time the plaintiff had to declare? in which THE CLERKS of the court differed; for some held, it ought to be the Term following; others said, he had two Terms to declare in:

Time to declare on a remanet in custodia.

Tidd's Pract.

197.

But HOLT, *Chief Justice*, said, that was too long to keep a man in custody upon a *remanet*, and ordered a reference to MR. CLERK; who said, the plaintiff ought to deliver a copy of the declaration to the turnkey, or marshal, some time the next Term:

But POWELL, *Justice*, thought the plaintiff had two Terms.

By HOLT, *Chief Justice*, A *remanet in custodia* will not charge a prisoner that has escaped, though THE MARSHAL should own him to be a prisoner in custody.

A remanet in custodia charges only the marshal after an escape.

And he also said, It was against law to charge a man in custody that is not in custody; for if he has escaped, he cannot take notice of any proceedings against him in a place where he is not. But the marshal's owning a person to be in his custody, will make the marshal liable to an escape, and charge himself.

A person resident within the walls of a prison may be detained.

If a person in custody go out of prison, and return again at night, and do so frequently; this HOLT, *Chief Justice*, said, was a continuance of the custody *ab initio*, and he might be charged with a *remanet in custodia*, or a declaration; for by his returning into the prison, he may have notice of the proceedings against him (a).

(a) A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the prison,

though he be not there by compulsion, *Wilkinson v. Jaques*, 3. Term Rep. 392.

Anonymous.

Case 24.

IF A PERSON enter into a recognizance to go to trial of an indictment, and by his own act procures a wrong *venire facias*, so as the indictment is quashed;

Procuring a wrong *venue* for the trial of an indictment, is a forfeiture of the recognizance.

HOLT, *Chief Justice*, said, this was a forfeiture of his recognizance; it being a trifling with the Court, and an ill practice, in putting the prosecutor to a great charge,

* [5]

* Anonymous.

Case 25.

THE PRINTER of a pamphlet called "*Legion's Address*," was bound to appear in the queen's bench the first day of the Term.

The defendant, on an information for a misdemeanor, is intitled, on pleading, to an imparlance until the next Term.

THE ATTORNEY GENERAL then exhibited an information against him; the defendant's attorney prayed an imparlance.

The question was, How long time he should have to imparl?

Easter Term, 1. Queen Anne, In B. R.

ANONYMOUS.

MR. ATTORNEY prayed it might be ruled according to the civil side, viz. to plead some day within the Term; but THE CLERKS said, the custom on THE CROWN SIDE is to give a Term.

HOLT, *Chief Justice*, said, Formerly they went upon this reason, that the Term, in the eye of the law, is but one day; but he said, there being an imparlance due by law, he thought it would be hard to make a rule to govern this case; and ordered THE CLERK to search precedents (a).

(a) Formerly, if a person indicted did not come in voluntarily, but was brought in by recognizance or *habeas corpus*, he was obliged to plead and try *instantly*. Case of the Seven Bishops, 3. Mod. 212. 4. St. Trials, 300. But this was thought hard, 6. Mod. 243. 12. Mod. 372. and if he came in upon the first process

he had an imparlance of course; and per HOLT, *Chief Justice*, on the crown side, the course is, whenever an imparlance is allowable, to grant it to another Term, Reg. v. Rawlins, 6. Mod. 243. and this now seems the settled practice, Rex v. Cox, 1. Show. 56. 4. Com. Dig. "Information" (D. 5.). Anonymous, 1. Salk. 514.

Case 26.

An old mortgage, assets.

Co. Lit. 374.

Dyer, 124.

2. Leo. 11.

Carth. 129.

2. Will. 49.

4. Brown. C.C. 2.

QUÆRE,—Whether if tenant in tail contract debts by bond, and die, and it can be made to appear, that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, such lease in equity would not be *assets* in the hands of the heir in tail (a); for it is equity only makes such leases descend (b), and it is the highest equity that a man's debts should be paid.

(a) See the case of the Attorney General v. Sir George Sands, Hardres, 489. S. C. 3. Chan. Rep. 33. S. C. Nel. C. R. 130. S. C. 2. Eq. Abr. 465. S. C. 2. Freem. 129. Fosset v. Austin, Prec. Chan. 39.

(b) Cooke v. Cooke, 2. Atk. 67. Charleton v. Low, 3. Peer. Wms. 330. Villers v. Villers, 2. Atk. 72.

Anonymous.

Case 27.

Prohibitions must be on suggestion.

A prohibition may be granted after sentence, in all cases where it appears on the face of the proceedings that the court below had no jurisdiction.

Comb. 234. 253. 448. 459. 463. Show. 396. 179.

ALL PROHIBITIONS are to be granted upon some suggestion, and not otherwise, which suggestions are to be brought into the office.

But *quære* of prohibitions to THE ADMIRALTY; for the court of admiralty does not use to set forth the special matter whereon they give sentence; but only reciting that they have heard both sides, and so proceed to give judgment; and then, they pretend, it is too late to move for a prohibition:

But by HOLT, *Chief Justice*, It is never too late to move for a prohibition after sentence, in any case but one, and that is to the ecclesiastical court, on the statute 23. Hen. 8. c. 9. where the suit is out of the diocese: and the reason why a prohibition is denied

Anonymous.

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nied in that case is, because you have by pleading owned their jurisdiction (a). ANONYMOUS

AND NOTE, Although in the case of *Acuna v. Saliffe* (b), a rule is laid down, that for anything not appearing in the libel, but only * suggested as matter collateral to it, no prohibition shall go after sentence (c); yet in the case of *Shatter v. Friend* (d), a prohibition went to the spiritual court after sentence, where they had disallowed proof by one witness, though that matter did not appear in the libel (or sentence): and DOLBEN, *Justice*, in that case said, that a prohibition ought to go rather after sentence than before (e); for then it will best appear that they have disallowed such proof (f).

A prohibition may be grounded on a suggestion of a matter which does not appear on the face of the libel.

• [6]

(a) 2. Roll. Abr. 318. *Tiler v. Mantle*, 1. Salk. 548. So in the admiralty court, it shall be intended, after sentence, that they had jurisdiction. *Ladbroke v. Cricket*, 2. Term Rep. 649. But wherever, in any case, it appears on the face of the proceedings, that the subject matter was not within the jurisdiction of the inferior court, a prohibition shall go, although sentence below has been pronounced. See *Gardner v. Booth*, 1. Salk. 548. *Rebowe v. Bickerton*, Bunn. 81. *Symes v. Symes*, 2. Burr. 813. *Smith v. Langley*, B. R. H. 317. *Dawson v. Wilkinson*, B. R. H. 381. *Shatter v. Friend*, 1. Show. 161. *Full v. Hutshins*, Cowp. 424. Case of the Rector of Bosworth, 1. Ld. Ray. 435. *Blaquiere v. Hawkins*, Dougl. 378. *notis*. S. C. 1. Term Rep.

552. *Bishop of Chichester v. Harwood*, 1. Term Rep. 650. *Leman v. Coultly*, 2. Term Rep. 3. *Velthuisen v. Ormsley*, 2. Term Rep. 315.

(b) Hob. 79.

(c) 2. Roll. Abr. 318. *Godh*, 164. *Lut. 1022*. *Hedd v. Winter*, Bunn. 312.

(d) 1. Show. 172. See *Smith v. Langley*, B. R. H. 317.

(e) Cowp. 424.

(f) For prohibitions after sentence, see 1. Sid. 65. 332. 1. Show. 158. 272. 6. Mod. 252. *Farell*, 148. 337. the case of *Edmonson v. Walker*, 1. Show. 179. a prohibition to the admiralty for refusing a plea of claim of property; and 6. Mod. 26. where a prohibition shall go if they refuse a plea of the statute of Limitations. But note.—NOT in former edition.

Anonymous.

Case 28.

THE opinion of this Court seemed to be, that the statute of Limitations, 21. Jac. 1. c. 16. did not extend to the admiralty nor spiritual courts; for

HOLT, *Chief Justice*, said, If a battery was committed *super al-tum mare* above four years since, if the plaintiff sue for this in THE ADMIRALTY, he may well recover damages there (a). See S. C. post. 43. 3. *Levinz*, 23 and 234. And a suit in the spiritual court is only *pro reformatione morum*, &c.

(a) But see 4. Ann. c. 16. s. 17. and 18. post. 43. *notis*.

Anonymous.

Case 29.

REDEMPTION OF SHIPS, &c. is a species of salvage; for if a pirate take a ship, and the master redeem the goods, the owners are bound by the contract of the master.—1. Salk. 3. 34. 1. Sid. 418. 1. Lev. 267. Hob. 12. Ransom of ships is a species of salvage, and the owner

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ANONYMOUS. owner shall make him satisfaction; for a master of a ship represents the owners, and may detain goods for salvage. But if he once part with them out of his possession, he cannot afterwards take them by an admiralty jurisdiction or process. For if the goods are on land, and the admiralty arrest the goods, a prohibition will go, if there is a libel; but if there be no libel, replevin or trespass is more proper (a).

(a) The captain of a captured vessel who ransoms her at sea, and becomes a *hostage*, may libel in the admiralty court against the ship and cargo for payment of the ransom, *Trantor v. Watson*, 6. Mod. 12. S. C. 1. Salk. 35. S. C. 2. Ld. Ray. 931. *Molloy de Jure*, Mar. 80. So also a promise made by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors in order to induce him to become a *hostage*, is binding on the owners although they abandoned

the ship and cargo, *Yates v. Hall*, 1. Term Rep. 73. But now by 22, Geo. 3. c. 25. no person shall ransom, or enter into any contract or agreement for ransoming, any ship or vessel, or any merchandize or goods on board the same, which shall be captured by the enemy: and all contracts and agreements entered into, and all bills, notes, and other securities given for such purposes are void, and the offender liable to a penalty of five hundred pounds,

Cafe 30.

The appeal from a *peculiar* is to the archbishop, and not to the bishop.—*Skin. 298.*

Anonymous,

IF A SENTENCE is given in A PECULIAR, the appeal is to the archbishop, and not to the bishop of the diocese; which proves it to be of exempt jurisdiction (a).

(a) See the case of *Jones v. Jones*, Hob. 185.

* * * * *

NOTE, The following CASES were heard and adjudged in the Court of KING'S BENCH, in *Easter Term*, in the First Year of the Reign of QUEEN ANNE.

[7]

Cafe 31.

* Stannian against Davies.

An action in an inferior court must lay the cause to have arisen within the jurisdiction; but matter of aggravation need not be so laid.

HOLT, *Chief Justice*, and the rest of THE COURT held in this case, that whenever an action is brought in an inferior court or jurisdiction, the complete cause of action must be laid to arise within the jurisdiction (a); but that matter which lies in aggravation need not be laid within the jurisdiction; as if an inn-keeper suffer my horse to be taken out of the stable without my consent, it is a complete cause of action; for thereby he is a wrong-doer; and though the riding and beating be done out of the jurisdiction,

S. C. 2. Ld. Ray. 795. S. C. 1. Salk. 404. S. C. 6. Mod. 223. S. C. Holt, 13. 1. Saund. 73. 7. Sig. 95. Ray. 75. 1. Lev. 50. 69.

(a) *Stra. 827. Ld. Ray. 1555. Wal-*
dock v. Cooper; 2. Will. 16. *Trevor*
v. Wall, 1. Term Rep. 151. *Tubb v.*

Wedward, 6. Term Rep. 175. *Welsh*
v. Troye, 2. H. Bl. Rep. 29.

yet

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yet the inferior jurisdiction may hold plea of it; the complete cause of action arising from the first taking, and the subsequent matter only being an aggravation.

STANFAN
against
Daries.

AND NOTE, This was on a writ of error of a judgment in the Marshalsea court.

And, BY THE WHOLE COURT, The judgment was afterwards affirmed in the queen's bench, in *Michaelmas Term*, in the third year of *Queen Anne*.

Anonymous.

FIRST, If a lessee for years build a house on the premises leased, it is waste (a); and if he let it fall, it is a new waste (b).

Waste by a lessee for years.

Co. Lit. 53.
2. Roll. Abr. 318.

SECONDLY, If a man has an upper-room, an action lies against him by one who has an under-room, to compel him to repair his roof. And so where a man has a ground-room, they over him may have an action to compel him to keep up and maintain his foundation (c).

An action lies by persons inhabiting a ground-floor against the tenant of the garret, to keep the roof in repair.

Sed quære: For if a man build a new house under the roof of an old house which is ready to tumble, Whether he shall have a writ *de reparatione faciendâ*? because *debet et solet* or *consuevit* are necessary words in the declaration. 1. *Vent.* 274. And **Dent v. Oliver* (d), where a man may have an action to charge a *terre-tenant*, he must lay a *debet et solet*, and shew a title.

* [8]

HOLT, *Chief Justice*, said, that every man of common right ought so to support his own house, as that it may not be an annoyance to another man's.

But POWELL, *Justice*, put this case: Suppose a man make a vault, and build a wall thereto, and then his neighbour makes a cellar adjoining to the vault, which is damaged by a default in the wall of the vault, he thought that the owner of the cellar might well have an action:

Which HOLT, *Chief Justice*, denied; for by him, before the party could entitle himself to an action in that case, he ought first to build a wall to his cellar, as well as the other to his vault; otherwise he ought not to have any benefit from the first wall (e); unless it be indeed agreed, that he shall contribute to the repair of it, &c. (f). Suppose a man has a vacant piece of ground, and

(a) But see *Kek* 38. and the case of *Lord Darcy v. Askwith*, *Hob.* 234. *City of London v. Greyne*, *Cro. Jac.* 181. *Cole v. Feith*, 1. *Mod.* 94. S. C. 1. *Lev.* 309. *Pool's Case*, 1. *Salk.* 368.

(b) 4. *Co.* 64. *Moor*, 177. 1. *Roll. Rep.* 216. 2. *Roll. Abr.* 316. *Owen*, 43.

(c) See the statute *Westminster the Second*, c. 23. 2. *Inst.* 403. *Moor*, 374. *Year Book* 6. *Edw.* 4. pl. 7. *Tennant v. Golding*, 6. *Mod.* 330.

(d) *Cro. Jac.* 43. 322.

(e) See *Barlow v. Norman*, 2. *Black. Rep.* 959.

(f) *Tennant v. Golding*, 6. *Mod.* 330. builds

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ANONYMOUS. builds a house upon part of it, and then sells the rest, the vendee cannot build so as to stop up any lights in the first house, but must take the ground subject to the incumbrance of the former lights,

Case 33. Cooper against The Hundred of Basingstoke.

If A. be assaulted and seized in the hundred of B. but led thence and robbed in the hundred of C. the hundred of C. is chargeable.

THIS was an action on the statute of Winton; and upon a special verdict the case appeared to be this:

Highwaymen assaulted the plaintiff in the highway, in the hundred of Micheldever, and led him out of the highway into a copse near adjoining, which copse was in the hundred of Basingstoke; and there they bound and robbed him.

The question was, Whether the action was well brought against the hundred of Basingstoke?

S. C. 7. Mod. 357.
S. C. Salk. 614.
S. C. 2. Ld. Ray. 326.
S. C. Holt, 638.

THE COUNSEL for the plaintiff insisted, that the action was well brought against the hundred of Basingstoke; that the robbery in the hundred of Basingstoke could not so relate to the first assault in the hundred of Micheldever as to make it a robbery in the hundred of Micheldever; and insisted on two rules: **FIRST**, That the law never operates by way of relation but in case of necessity, to prevent a wrong, or to do justice. **SECONDLY**, That a relation of law shall not operate to the injury of a third person. However an act may relate, by fiction of law, between the robbers and the party robbed; yet it shall not relate to the prejudice of the hundred (a).

* [9]

THE COUNSEL for the defendant insisted, that the action ought to be against the hundred of Micheldever, where the first assault was, and that the rest is but one continued act; that the fault was in the hundred of Micheldever, where the assault was in the highway; but the robbery was not in the highway in the hundred of Basingstoke; and the hundred is not obliged to guard other places. A traveller going through a new way laid out shall not have an action against the hundred (b). The action ought to be against both hundreds: and one reason why, if a robbery be in divisis hundred. both shall be liable, is, because both are in fault in not keeping watch.

In the Michaelmas Term following this case was spoke to again.

MR. KING, for the plaintiff, said, that the action was well brought against Basingstoke, for that the hundred in which the taking the goods was is only chargeable; and insisted on the words of the statutes 13. Edw. 1. c. 4. 28. Edw. 3. c. 11. 27. Eliz. c. 18. all which mention the hundred where the robbery is done. Robbery is a species of theft, and differs from common larceny

(a) Hutton, 125. Goldsb. 56. pl. 11.

(b) 6. Co. 61. Rex v. Ward and Lyme, Cro. Car. 267.

only in the manner of taking (a). And to make a robbery, there must be a taking the goods from the person of the honest man into the possession of the thief (b). An assault to rob a man is no robbery (c). Then the hundred of *Basingstoke* is the hundred where the robbery was committed; for the goods were there taken from the honest man (d). All crimes are local, and must be tried where committed (e); and therefore if the two hundreds were in two counties, it must be tried in the county where the taking from the person of the man was. It is objected, that a man may be said to be robbed where first assaulted, for he and all about him is in the possession of the * thief, and the subsequent act shall relate to the first act; but the answer is, that the assault is no robbery (f). Relations are but fictions in law, and never used but in cases of necessity (g); but here is no need of such relation. It is also objected, that the first default is in the hundred of *Micheldever*, in not keeping due watch; but that objection is grounded on a wrong construction of the intent of the statute; for the design of the statute is not only to punish the hundred for not keeping watch, but to punish them if they do not take the offender after the robbery done, and to fortify the common law, by which the hundred was to be amerced, if they did not take the robbers, as appears in *Bracton* (h), *Fitzberbert* (i), and *Staundford* (k). And the statute of *Winton* was made in affirmance of the common law (l). A case has been cited on the other side (m), where robbers drive the waggon out of the way in the day-time, and rifle it in the night, it shall be said a robbery in the day and another in the night; but both these are extrajudicial, and not the point in question (n). To the objection, that the action ought to be against both hundreds, it was answered, that the statute gives it only where the robbery is in *divisid hundred*, and not elsewhere. The authority of the case of *Rex v. Ward and Lyme* (o), where a traveller going through a new way cannot bring an action, may be questioned, because it goes on that foundation, that the design of the statute is only to guard the highway, and not to take the robbers. And *Savil's Case* (p) is express in point.

* [10]

BRODERICK for the defendant argued, that the statute has always been construed equitably; and that the design of the act is to give an action against that hundred which by the common law should have been amerced; and insisted on the title of the statute, that it is the * duty of the hundred only to guard the highway; and it must be supposed, that the robbery was committed in such a place

* [11]

(a) Hale P. C. 71. 3. Inst. 69.

(b) Hale, 72. 3. Inst. 68.

(c) But see 7. Geo. 1. c. 22.

(d) 3. Inst. 80.

(e) 13. Co. 53. Hale's P. C. 69.

(f) Hale's P. C. 71.

(g) 3. Cro. 28.

(h) Bract. Coron. 3. b.

(i) Fitz. Abr. "Coron." 238. 293.

(k) Staundford's Pleas of the Crown, 336.

(l) 3. Inst. 117. 2. Edw. 3. pl. 6. b. pl. 7. a. Hutton, 125. Goldsb. 86.

(m) 1. Sid. 263.

(n) NORZ, The Book does not say so.

(o) Cro. Car. 267.

(p) 1. Mod. 221.

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from whence HUE AND CRY could be made. To *Savill's Case* it was answered, that the exception taken there was only, that it was not laid in the declaration to be done in the highway; and that need not be; any more than to lay it to be done in the day-time; but there are many authorities that confine it to the highway (a). In the case of *King v. Smith* (b), the river of *Thames* is adjudged to be a highway within that act; that the general practice is to watch on the highways only, which is a traditionable and reasonable exposition of the act; that if a hundred be answerable for a robbery within an inclosure, yet the right hundred is not charged; for *Micheldever* suffered the traveller to be assaulted, and in consequence of that negligence the party was robbed: but it does not appear but that the highways in *Basingstoke* were well guarded.

In *Hilary Term* following,

HOLT, *Chief Justice*, gave judgment for the plaintiff, that the action is well brought against the hundred of *Basingstoke*.—It has been endeavoured to be maintained, that the robbery was begun in the hundred of *Micheldever*, but it is plain it was committed in *Basingstoke*: If there had been two counties, as there are two hundreds, the trial must have been in the county where the robbery was; and the robbery being in *Basingstoke*, the express words of the statute are, that that hundred shall be liable. There is no reason to make it relate to the first assault. A stroke is given one day, and the party dies another, the death shall relate to the day of the stroke, so as to charge the lands, but not to collateral purposes. A mortal wound is given, and the party dies a month after it, the death shall not so relate to the stroke as to make him that before the death receives the murderer an accessory (c). A pardon of all offences is granted after the stroke, and before the death, this pardons the stroke; and though the party die, the murderer is discharged. But here there * is no colour for a relation, for the assault is not the direct cause of the robbery. It may be a *causa sine qua non*, but not the necessary cause. This is the same point that was determined in *Dean's Case* (d); and the case in *Gouldsbrough* (e) allows of this case. Thieves take the horses from the carrier in one hundred, and rifle the packs in another, the first hundred shall be charged, because it was a robbery in that hundred; but if the carrier had led his horses himself into the second hundred, the second hundred should have been charged. The true reason of this case is, that the hundred of *Basingstoke* is charged, not because they did not prevent the robbery, but because they have not taken the malefactors; for if a robbery be committed, that does not charge the hundred, if within forty days they apprehend the thieves. Here

* [12]

(a) 3. Lev. 262. 350. Cro. Jac. 497.
Moor, 620. Goldsb. 60.

(b)

(c) Year-Book 11. Hen. 4. fo. 49.
Plowd. 401.

(d) Hutton, 125.

(e) Goldsb. 60.

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was no obligation on the hundred of *Micheldever* to pursue or apprehend them, because no robbery in their hundred. If the assault had been in one hundred in the day, and the party was carried into another hundred, and kept until night, and there robbed; or if he was assaulted in the highway in one hundred, and carried to a house in another hundred, and there robbed; in either of these cases no action had lain.

COOPER
against
T
HUNDRED OF
BASINGSTOKE.

Lane and Others against Cotton.

Cafe 34.

THIS Term the court of queen's bench gave judgment in this cause, which had been argued several Terms at the bar.

Action on the case will not lie against the post-master for loss of exchequer-bills and letter delivered in at an under-office.

* [13]

S. C. 5. Mod.
455.
S. C. Salk. 17.
143.
S. C. Comy.
100.
S. C. Carth. 487.
S. C. 12. Mod.
472.
S. C. 1. Ld. Ray.
646.
S. C. Holt, 582.
3. Mod. 323.
Molloy, 209.
1. Bac. Abr. 48.
3. Bac. Abr. 561.
Harg. Co. Lit.
89. b. note (3).

The case was thus: In an action on the case the plaintiff declared upon the statute 12. Car. 2. c. 35. which establishes THE GENERAL-POST-OFFICE; setting forth the said statute, with the exceptions therein; and then set forth, that he delivered several *exchequer-bills*, inclosed in a (letter) cover, at a certain place, unto a certain officer there, appointed by the post-master to receive letters and parcels to be conveyed to the said general-post-office: * which said letter and bills so delivered miscarried, and came not to the party's hands to whom they were directed. And on not guilty pleaded, the jury found A SPECIAL VERDICT, in which all the said matter set forth in the declaration was found; and further, that the said general-post-master takes security of his under-officers; and that the letter (cover) in this case was broke open, and the bills taken out by a person unknown.

THE QUESTION was, Whether an action lay against the post-master for the negligence of his under-officers?

GOULD, *Justice*, argued, that judgment ought to be given for the defendant, and that upon consideration of the said act of parliament.

FIRST, This office was designed by the statute to be a *letter-office* only, for the benefit of commerce by the quick dispatch of intelligence; and although it should happen, that a letter should miscarry, yet no action will lie for this loss; for though a man may have a property therein, yet that property is *nullius valoris*, of no value or esteem in law (a), especially if it be only the communication of a man's mind, and no obligation contained in it. And by this reason will this case be ruled; for though these bills out of the exchequer were of value, and trover will lie for them, yet they were conveyed here as letters, and so shall not have a worse effect, as to the post-master, than letters.

SECONDLY, Here is no such thing as a *contract* between the plaintiff and the post-master; for he is by a *medium* the king's officer. But if there is any such thing as a contract, it is between

(a) But see now the statute 2. Geo. 2. c. 25. f. 3. 1. Hawk. P. C. 7th edit. page 136.

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the plaintiff and the under-officer, who took the letter of the plaintiff; and there is a trust reposed in the under-officer by the act: and though such under-officer is named by the superior, he is in as it were by THE KING. Suppose the post-master should die, the under-officers would be continued, and their places are not void thereby; and then suppose this should have happened in such vacancy, then this under-officer would undoubtedly be only chargeable.

- * [14] * THIRDLY, The statute has provided, that if any of the under-officers commit any fault, they shall be cashiered or turned-out; and so every officer by his superior, and the head-officer by the king; as appears by the sixth and tenth paragraphs. Another consideration is, they are obliged to take in all letters and parcels brought to them; if they might refuse them, it might be otherwise. Another is, that they are obliged to make speed, and to travel by night, when the law does not allow them the protection of the statute of HUE AND CRY (a). And then as to *Mosser's Case*, cited on the other side, which was, where goods were put on board a ship, to be sent beyond sea, and were stole out of the ship, in the port, by the negligence of the master, and adjudged the master should be answerable; here is this difference between this and that case, that the master of the ship makes his bargain for his carriage, half of which is paid down before-hand, which is a contract, and so at his peril he is to procure safe carriage; but in this case the recompence is not variable on the contract of the parties; and their revenue or profit that arises out of this office is but by accident, and not by contract.

FOURTHLY, If there were a trust designed by this act to be reposed in the post-master, and the law allowed the same trust to be in him as in a carrier, a master of a ship, insurer, &c. yet this particular case is out of the act of parliament; for it is designed by that act, that he shall only take the trust of letters, and not of treasure, as these bills are.

POWYS, *Justice*, first considered the several statutes that establish exchequer-bills, and upon the whole concluded, that they were not *treasure*, nor of the nature of *current coin*. His chief reason was, because no subject was obliged to take them in any payment; neither were they a sufficient tender; and so they were things that were not forbid to be carried by the post, if any person would venture them.

- * [15] But, SECONDLY, he urged, that the officers were not responsible for any thing that was lost by accident; and no misfeasance could be charged upon any of the * officers; for the special verdict finds it to be done "by a person unknown."

(a) 13. *Edw. 1. ft. 2. c. 1.* commonly called the statute of *Winton*, and 28. *Edw. 3. c. 11.*

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Then he insisted upon the inconveniencies the officers of the post-office were forced to undergo, because they were obliged to speed ; that they were often forced to deliver the letters to the servants, &c. of the person to whom they were directed ; and then when the party has received them safe, he may be alone when he opens them, and though he do safely receive such things as these bills in a letter, yet he may pretend he has lost them ; and that they being obliged to travel on *Sundays*, by night, and in countries out of the king's dominions ; they have not therefore the protection as others have in case of robbery ; and then their *premium* is so small, that it bears no proportion to the trouble they have ; and if these actions were encouraged, it would set up a kind of insurance for carriage, and in a little time destroy the office.

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THIRDLY, The post-master-general is not answerable for any neglect in the inferior officers ; for he is but a fellow-servant with them ; by the patent he has a salary appointed for him, and the under-officers for them ; and it is the king, and not he, that is their paymaster ; and moreover, the patent appoints their security to be given to the king ; and all their salaries are to be paid to them by the receiver-general out of the public revenues of the kingdom, and the *quantum* is settled by the patent ; and the post-master-general has his office *durante bene placito*.

But it may be objected, that here may be a wrong sustained without any remedy. I answer, it is often so when no person can be found against whom to have the remedy ; so here the verdict finds it done *per personam ignotam*.

So he concluded judgment for the defendant.

TURTON, *Justice*, was of the same opinion, and upon the same grounds.

HOLT, *Chief Justice*, was of opinion, that judgment ought to be given for the plaintiff ; and he said, it might be some question, whether this action would lie, if things had been lost upon the road in travelling ; but it being found by the special verdict in this case, that they were lost * out of the office, all the arguments relating to that are out of the case.

* [16]

FIRST, This statute was made for the public good ; and there is a trust reposed in the post-master, and he is to have the custody of the officers and the office ; and he is like THE MARSHAL of the King's Bench or Fleet-prison, who are entrusted with the care of the prison, 4. Co. 84. and if their prisoners are freed by any insurrection or tumult of the people, they shall not be excused : so the law intrusts a sheriff with the goods taken upon a *fieri facias*, and he is to keep them for the plaintiff, and must make him satisfaction if lost ; and there is no difference between those instances and this case.

SECONDLY, The subject pays a reward for carrying letters ; and it is like the case of a host, who shall be chargeable when he has
VOL. XI. C a reward.

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against
COTTON.

a reward (a). And as to JUSTICE GOULD's reason, that there is no contract between the parties, there needs none; and where the subject entrusts any one with valuable things, he must have a remedy for them, which here can be against none but the post-master. It was resolved not long since, that an action would lie against the master of a ship for things stolen out of the ship, because the master is entrusted with the care of them; and yet as the post-master has no advantage of the profits of the office, but has his salary from the king, so the master of a ship is paid by the owners (b):

* [17]

THIRDLY, The same circumstances concur in this case to make the defendant chargeable as in the other cases of a carrier or a master of a ship, &c. The reason which is given in the civil law for making a carrier chargeable, and upon which our law no doubt was founded, is, because a carrier may be in correspondence with those that rob him; and the like reason may be given here. As to the objection, that a carrier is chargeable because he may sue the hundred, it is not good, for this action lay against him before the statute of *Winton*; and if he lose goods out of his warehouse, this action will lie against him; yet in that case he cannot sue the hundred. If a smith * upon the road refuse to shoe my horse, I shall have an action upon the case against him (c). And here the post-master is obliged to take in such things as are within the statute; and these bills are proper to be sent by the post; for it appears by the act, which limits what shall be carried, that other things than letters may be carried; and the act seems to permit anything that is light of carriage to be carried; and though these bills are things created since the act of 12. Car. 2. c. 35. and so could not be taken notice of in that act, yet they are within the same reason as the things limited in the act.

FOURTHLY, The post-master here accepts the letters under the same condition, for safe keeping, as in *Southcote's Case* (d). *Southcote* lent the defendant his goods, "*safement garder*," and they being stolen from him, *Southcote* recovered in *detinue* for them. It is granted, that those who were post-masters before the act were liable, and received such letters and parcels under such condition of "*safement garder*;" and since it is not apparent the act makes any difference, it would be very hard to bar the subject of his action, when the act has barred him of his choice; for now he is confined to one post-master, whereas before he might chuse out of several.

FIFTHLY, If a deputy be guilty of misfeasance, an action will lie against him; but for the nonfeasance or negligence of a deputy, the superior is punishable; and in this case, if any misfeasance

(a) *Gelly v. Clerk*, Hob. 18. Cro. Jac. 188.

(b) See Cowp. 764. where this position of LORD HOLT is controverted by LORD MANSFIELD.

(c) *Keilway*, 50.

(d) 4. Co. 83. b.

Easter Term, i. Queen Anne, In B. R.

could be proved upon any particular deputy, as the taking out of the bills by him, he should have been punishable; and if a deputy do any act which if done by a superior would be a forfeiture of his office, such act by a deputy will have the same effect. As to Mr. JUSTICE POWYS's argument, who makes the post-master-general a servant with the inferior officers, I think otherwise; because, though they are not under his pay, yet they are under his direction, and so are his servants. Besides, in other particulars, it appears by the act itself, that the post-master-general shall be accountable for the act of his inferior, viz. the clause relating to the * providing of horses; in that case, if a deputy at York refuse horses, it is the post-master-general shall incur the forfeiture.

LANE
AND OTHERS
against
COTTON.

* [18]

And a writ of error was brought and allowed on these reasons of HOLT, Chief Justice.

Sed quære quid inde venit (a).

(a) The court of king's bench gave judgment for the defendants, S. C. Comy. Rep. 108.; but LORD RAYMOND says, he was informed that the defendants, perceiving that the plaintiff intended to bring a writ of error on the said judgment, paid the money to the plaintiff, S. C. 1. Ld. Ray. 658.; and so put an end to all further proceedings in this case, Lord Holt's MSS. 3. Peer. Wms. 394. *notis*. But there are no traces in the exchequer-

chamber of any writ of error having been brought, nor in the post-office of the money having been paid, Cowp. 762. This point, however, came before the court in Easter Term, 18. Geo. 3. in the case of Whitfield v. Lord Despenfer, in which it was determined, that an action on the case will not lie against the post-master general for a bank-note stolen by one of the sorters out of a letter delivered into the post-office. Cowp. 754.

THE HISTORY OF THE

[18]

IN THE

OF THE

1851

E A S T E R T E R M,

The First of Queen Anne,

I N

The House of Lords.

Ranger *against* Ashmead.

Case 35.

A COPYHOLDER FOR LIFE of a house and land, that by the custom of the manor may fell timber for repairs of the copyhold tenement, brings an action of trespass against the servant of the lord, who entered by the lord's command and cut timber upon the lands of the copyholder, by which the copyholder had not sufficient to repair the copyhold tenement (a).

Copyholder bound to repairs; the lord cuts his timber.
S. C. Salk. 638.
S. C. 12. Mod. 378.
S. C. Holt, 162.
S. C. Comy. 71.
S. C. Fort. 152.
S. C. 1. Ld. Ray. 551.
Post. 68.
1. Leon. 272.

IT WAS ADJUDGED in the court of queen's bench, by all the Court, that the copyholder might have this action.

This judgment was afterwards affirmed in the exchequer-chamber by all the Judges in *England*.

And now reversed in the house of lords, eleven against ten.

Heu misera servitus ! ubi jus est vagum.

(a) See Heydon v. Smith, 13. Co. 67. 392. S. C. Owen, 63. Swain's Case; S. C. Godb. 172.—See also East v. Har- 3. Co. 64. Stebbing v. Gofnal, Cro. ding, Cro. Eliz. 498. S. C. Moor, Eliz. 629. Gilbert's Tenures, 239.

THE TIT OF QUON AVANT

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THE TIT OF QUON AVANT

TRINITY TERM,

The First of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

Sir Lyttleton Powys, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Simon Harcourt, Esq. Solicitor General.

* [19]

* *Machel against Clerk.*

Cafe 36.

IN ERROR out of the court of common pleas, the case upon the special verdict was thus :

A tenant in tail covenanted to stand seised to the use of himself for life, remainder to divers other persons ; and afterwards suffered a recovery to other uses.

THE QUESTION was, Whether this recovery was a good recovery ?

If by the covenant to stand seised he made any alteration in the estate-tail, then the recovery could not be good ; for there was a wrong tenant to the *præcipe* : if by the covenant to stand seised there was not any alteration, then it was good.

But ALL THE COURT held, that by the *covenant to stand seised* there was no alteration, and so the recovery was good.

good, and bars the issue in tail ; for the covenant to stand seised made no alteration in the estate-tail, but conveyed a *base fee*, defeasible only by the entry of the issue in tail.—S. C. 7. Mod. 18. S. C. 2. Salk. 619. S. C. Comy. 119. S. C. Holt, 615. S. C. 2. Ld. Ray. 778. 2. Jones, 105. 2. Mod. 207. 1. Vent. 372. 2. Vent. 260. Ld. Ray. 155. 3. Peer. Wms. 206. Wilson on Recov. 247. Wright's Tenures, 186.

If tenant in tail covenant to stand seised to the use of himself for life, with remainder to the use of his son in tail, and afterwards suffer a common recovery, in which he is tenant to the *præcipe* with single voucher, to other uses than those in the covenant to stand seised ; THE RECOVERY is

Trinity Term, 1. Queen Anne, In B. R.

MASTERS
against
CLERK.

HOLT, *Chief Justice*, delivered the opinion of the Court, but only his own reasons, but the rest of the Judges agreed with him.— It has been a question, Whether, if a tenant in tail make a grant with livery, bargain and sale, lease and release, it gives the grantee, bargainee, &c. any greater estate than for the life of the tenant in tail? But it has been held, that it creates a base fee in such grantee, &c. which is against the opinion of *Litt. sect. 649, 650.*; and the reasons for it have been these :

* [20]

FIRST, Because a tenant in tail has more than an estate for life; he has the inheritance in him, as appears by *Co. Lit. fo. 18. a.* If a gift in tail be made to a villein, and the lord enter, the lord has a fee-simple qualified; * which could not be if the villein, as tenant in tail, had not as great an estate in him.

SECONDLY, He has the whole estate in him; therefore these sort of conveyances are incidents to it.

THIRDLY, It is no prejudice to the heir in tail, nor against the statute *de Donis*; the putting the issue to a *formedon* is no breach of the statute *de Donis*, so it does not put him to an entry (a). Such a bargainee has a descendible estate, and his wife shall be endowed of such estate. *Littleton* says (b), the estate of such releasee or bargainee is determined by the death of tenant in tail; but by these opinions it is not determined until the issue enter; the issue is not barred of his *jus recuperandi*, but until he uses that, the other has a good estate; and so in the case of *Sackville v. Earnsley* (c), and *Maud v. French* (d). In the *Case of Exchange* (e), if a tenant in tail in exchange give a fee-simple, it is good until avoided by the issue in tail; and yet the rule is, that both the estates exchanged must be equal in quality; which proves there may be a fee-simple passed out of the tenant in tail, and good until avoided by the issue: but notwithstanding all this, in this case, the *covenant to stand seised* does not alter the estate-tail, and so the recovery is good; because by this covenant these uses do not take effect during the life of the tenant in tail, which they must do if they make any alteration in the estate-tail; or at least there must be a possibility of their taking effect during his life; but here they are not to vest till after his death, and so signify nothing, because the title of the heir in tail, which is paramount, vests immediately. But it may be said, that here he has made himself tenant for life, and by that the estate-tail is altered during his life: but to this I answer, that it has no effect (thereon), but is absolutely void (as to that), it being only made to support the remainders.

And the judgment in the court of common pleas was affirmed.

NOTE, The case in 1. *Sand. 260.* (and *Litt. sect. 612.*) was denied to be law in this case, *per* HOLT, *Chief Justice*.

(a) See *Seymour's Case*, 10. Co. 96.
and the *Case of Fines*, 3. Co. 84.

(b)

(c) *Winch*, 5.

(d) *Bridg.* 92.

(e) *Co. Lit.* 5.

HILARY

HILARY TERM,

The First of Queen Anne,

I N

The Queen's Bench,

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*

Sir Henry Gould, *Knt.*

Sir Lyttleton Powys, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

* Jasper against Eadowes.

• [21]
Case 37.

TRESPASS *quare clausum fregit*, and destroyed his oats. The defendant confessed the trespass, which was committed by a pig, and pleads in bar, that the plaintiff distrained the pig for the trespass, and him *imparcavit et detinuit*. The plaintiff by replication confessed the taking and impounding of the pig, but that it escaped without his consent. The defendant demurred.

GOULD, *Justice*. The plea is naught, not saying that "*adhuc detinet*," and the replication is good, without saying that the pig escaped *sine defaultu* of the plaintiff; and that judgment ought to be for the plaintiff. The plaintiff had his election either to bring his *action* or *distrain*; and though he distrained, if the distress had died, the right of the action would have remained to the plaintiff (a). And the reason is, because the distress is in the nature of a pledge, which may be pleaded in bar, so long as it is in the plaintiff's possession; but being once destroyed or eloined, without his default, the plaintiff's action is revived. If the pig had been rescued

To trespass for an injury done to the plaintiff by the defendant's pig, A PLEA IN BAR, that the plaintiff impounded and detained the pig, without saying, "and still detains," is good; and the plaintiff, being bound to keep the thing distrained at his peril, cannot REPLY, that the pig escaped against his will and consent from the pound; but his remedy is by writ *de parco fracto*.

(a) Dr. & St. c. 27. Hob. 61.

JASPER
against
EADOWES.

* [22]

in carrying to the pound, he might pursue and retake it (a); and in such case, it would be in his election to admit himself out of possession or not (b). If the plaintiff had suffered the pig to escape by his own consent, the trespass had been discharged; but that should have been shewn in the bar. And the plaintiff lays, it escaped *contra consensum * et voluntatem*. Besides, the bar is bad for not saying, "*et adhuc detinet*." If a *scire facias* be brought against the bail, on a judgment against the principal, and the bail plead that the defendant was "in custody," this plea is bad, without saying he is "still in custody (c)." So it is regularly true, that you must aver that which continues the wrong (d). The replication is good to a common intent; and if any default was in the plaintiff, it ought to have been shewn by the defendant, who is to have the advantage (e). If the defendant had sued a replevin, the sheriff might have returned the special matter, that the pig was dead, or taken away by the defendant, or escaped (f). And therefore judgment ought to be for the plaintiff.

Powys, *Justice*. At common law, a distress is only a gage, and no satisfaction (g). But since the statute of 2. Will. 3. c. 5. it is a satisfaction, as to rent (h); but as to trespass, the common law is not altered (i). And the distress is so far a gage, that he cannot do anything for the bettering the distress; and that is the reason, that if a milch cow be distrained, the distrainer cannot milk her (k). Nor can the distrainer tie the distress in the pound (l); for he cannot meddle farther than barely impounding it. It should seem reasonable, that the distrainer should have farther indulgence in a public than in a private pound. If cattle distrained for rent die in the pound, he may take a new distress (m). But I take it, that in this case the plea is good and the replication bad; for he does not say, that the pig escaped without his default; and it may very well escape against his will or consent, and yet by his default; for suppose, after the pig was impounded, the plaintiff opens the door of the pound, and the pig slips out, this is against his will, and yet by his default. To the objection, that the defendant in his bar ought to have said "*et adhuc detinet*," I answer, that the plea is good to a common intent; and I think better pleaded as it is; for * he sets forth the truth, and it might be dangerous to say "*et adhuc detinet*;" for the plaintiff might traverse it; and it is enough for the defendant that the *detinet* is

* [23]

(a) Bk. of Assizes, 27. Aff. pl. 74.—
See also Fitz. N. B. 101.

(b) Bishop and Jourdain v. Montague,
Cro. Jac. 50.

(c) Rastal Ent. 171.

(d) Year-Book 12. Hen. 8. pl. 2.
13. Hen. 8. pl. 5.

(e) 1. Leon. 18. 1. Vent. 54.

(f) Bro. Abr. "Retorn," 125.
Dalton, "Retorn," 124.

(g) Bagshaw v. Goward, Cro. Jac.
143.—See also Foster v. Jackson, Hob.
61.

(b) 6. Mod. 215. 4. Mod. 390.

(i) But see 11. Geo. 2 c. 19. s. 19, 20.

(k) 1. Roll. 673.—And it was said,
that this case in Rolle is better authority
than the case of Bagshaw v. Goward,
Cro. Jac. 143—See also Noy, 119.
1. Leon. 220. 1. Vent. 37. Cro. Eliz.
783.

(l) 1. Roll. Abr. 673. pl. 26.

(m) Dyer, 28. Hob. 61. Year-Book
25. Edw. 5. pl. 6.

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intended by the law: and that judgment ought to be for the defendant.

JASPER
arguing
EADOWES.

TURTON, *Justice*. The plaintiff had his choice of two remedies, *distress* or *trespass*, and his election of the one is the rejection of the other. "*Levy per distress*" is a good bar to debt for rent; and for the same reason a good bar in trespass. A distress is no satisfaction, but may be kept until satisfaction; and it is the plaintiff's duty to keep the distress. FIRST, Because he had a choice of his pound. SECONDLY, He had an interest in the pound, though in another man's ground; for the pound is his pound, and he only can have a *parco fracto*, and not his servant, or the owner of the soil. THIRDLY, If the plaintiff had distrained dead goods, he must have put them in a *pound covert*, that they might be kept dry; otherwise, if they were spoiled or abused, he is to answer for them (a). Whence it may be inferred, it is at the plaintiff's peril to put the distress in a safe pound, and keep it in safe custody. If the defendant had taken away the distress, a *parco fracto* would have lain against him; and that was his only remedy, and not an action of trespass. It does not appear that the defendant ever got his pig again; and it is unreasonable he should suffer a double punishment, since he made no default, and the plaintiff made his election. Judgment ought to be for the defendant.

HOLT, *Chief Justice*. There was a time when the plaintiff could not have this action, namely, while he had the distress in his custody. The defendant's plea is a total bar *ab origine*. If the plaintiff will avoid this bar, he must shew the special matter that will entitle him to revive his action; and that he has not done. To the objection, that he has not pleaded "*et adhuc detinet*," I answer, that a bar is good to a common intent, and the plaintiff ought to shew how the distress was lost; for it must be presumed he can give the best account of it; and perhaps he put it into a pound that was out of repair; but whether in a *private*, or a *public*, or a *common pound* (b), it matters not; for the law * has not appointed any such thing as a *common pound*; they are only by the agreement of lords and tenants; and so are *haywards* and *keepers of pounds*. The distress is for the benefit of the distrainer; wherever he impounds the pound is his, and he only can have the *parco fracto*; and therefore the keeping the distress is at his peril. In the replication, the plaintiff ought to shew what became of the distress. It might escape through his neglect, though *contra voluntatem*. Had the pig died in the *pound overt*, the act of God would have revived the action. As to the case of a *replevin*, it is not enough that it be good to a common intent; for the rule is, that replevin must be good to a certain intent in general, but a bar may be good to a common intent.

* [24]

Quare de boe,
and if not an
article of the
leet, to enquire
if the common
pound was out
of repair.

So judgment was given for the defendant.

(a) Co. Lit. 47. 1. Roll. 133.

(b) Co. Lit. 47.

Case 38.

Cutting against Wilkins.

If a declaration contain two counts, one good and the other bad; an entire judgment that the plaintiff do recover his damages *aforsaid* is erroneous.

S. C. 7. Mod. 154.
S. C. Salk. 24.
S. C. Lilly. Ent. 227.
S. C. Holt, 273.

THE PLAINTIFF in the original action counts upon a note payable to him or order, according to the custom of merchants; and further counts upon an *assumpsit* for monies received to his use. Judgment by default, and several damages, but an entire judgment *quod recuperet damna prædicta*; whereupon error was brought.

WELD for the defendant in error, to support the judgment, insisted, that though the action, according to the custom of merchants, does not lie in this case (a), yet the damages being several, and judgment *quod recuperet damna prædicta*, it shall be taken as a several judgment, and not joint. And therefore if judgment be reversed for the damages given on the bad count, yet it shall stand for the rest; and insisted on the case of *Miles v. Jacob* (b), and the case of *Reynolds v. Grimstone* (c), which are express in point.

PENGELLY for the plaintiff in error insisted, that the first count was not good, for that there was no consideration, according to the cases of *Clerk v. Person* (d), and *Goddard v. Smith* (e), adjudged in this court. * And as to the point, though the damages are several, the judgment is entire, and must be reversed in the whole; and denied the authority of the case of *Miles v. Jacob* (f), which has been contradicted by many judgments since (g). And the plaintiff ought to have remitted his damages on the insufficient count, according to the case of *Pinkney v. East Hundred*, in *Rutland* (h).

THE COURT were of opinion to reverse the judgment *in toto*; and denied the authority of *Miles v. Jacob*; for the judgment being entire, cannot be reversed in part.

And the judgment was reversed *nisi* (i).

(a) But see 3. & 4. Anne, c. 9.

(b) Hob. 6. Cro. Jac. 343. 1. Roll.

(c) Moor, 708.

(d)

(e) 6. Mod. 261. 1. Salk. 21.
2. Salk. 456. 3. Salk. 245. Post. 56.
Holt, 497.

(f) Cro. Jac. 343.

(g) As Cro. Jac. 424. Lloyd v. Pearce,
1. Roll. 775. 1. Keb. 232. Stiles, 121.
125. Gregory v. Eades, 1. Vent. 27.

39.

(h) 2. Saund. 380.

(i) See Eddowes v. Hopkins, Dougl.
377. Grant v. Astle, Dougl. 723. 730.

The Queen against Whistler.

Case 39.

THE DEFENDANT was convicted before a justice of peace on the statute 3. & 4. Will. & Mary, c. 10. (a), setting forth, that the defendant was *illicitus et injustus auxiliarius* to one Rolf in killing five deer, by persuading and exciting the said Rolf to hunt and kill the same, by lending a dog to hunt and kill the same, and a horse to bring them away, *contra formam statuti*.

THE QUESTION was, Whether the defendant was an aider and abettor therein, within the intent and meaning of the statute? and, Whether, if the words "aiding and abetting" were not in the statute, the defendant would not be a principal?

POWYS, GOULD, and POWELL, *Justices*, adjudged him to be guilty within the statute, against the opinion of HOLT, *Chief Justice*.

GOULD, *Justice*, held "aiders and assisters therein" to be the same as "aiders and assisters thereto;" and from the preamble of the act inferred, that the defendant was within the meaning of the act (b); and that "aiding and assisting" ought to be taken in the largest sense, being a remedial statute.

It was objected, that "aiding and assisting therein" must be in the fact; for that aiding before the fact is inciting, but not assisting, &c.

* But aiding may be before; as in 12. Rep. 81. he that gives his consent to a trespass is a principal, and so an aider in the fact. So he that incites, is aiding in making false money, is guilty of high treason, and *particeps criminis* before the fact. But if the word "aiding" was out, yet he who aids before the fact is a principal, being only a trespass. 13. Hen. 7. 12. Upon the statute

(a) Repealed by 16. Geo. 3. c. 30. s. 27. and other provisions upon this subject enacted. See 1. Hawk. P. C. 7th edit. chap. 46.

(b) The preamble of the statute recites, "Whereas, notwithstanding the many good laws before this time made, which do prohibit unlawful coursing, hunting, or killing of deer, yet inasmuch as the penalties thereby provided are found by daily experience not to be sufficient to deter divers disorderly persons, who confederate together in great numbers, making among themselves, as it were, a brotherhood and fraternity, whereby, if any of them shall be discovered and convicted, which seldom happens, because of their great force and clandestine manner of cohabitation, they, by a common contribution (for the most part), ad-

vance and pay for such persons so apprehended, the pecuniary penalties inflicted on such offenders, by reason whereof the other confederates escape discovery and condign punishment; therefore, for the more effectual discovery and punishment of such persons, BE IT ENACTED, that if any person or persons shall unlawfully course, hunt, take in toil, kill, wound, or take away, any red or fallow deer, in any ground inclosed, or shall be aiding or assisting therein, that then every such person so offending by unlawful coursing or hunting only, when no deer is taken, wounded, or killed, shall forfeit 20l.; and in case any deer shall, by such person or persons, be wounded, taken, or killed, such person or persons shall respectively forfeit 30l. &c."

If a statute enact, "That if any person or persons shall course, hunt, take in toil, kill, or wound, any deer, or shall be aiding and assisting therein, that then every person so offending shall forfeit so much, a person who aids and assists another by persuading him to hunt and kill the deer, by lending him a dog and a horse for that purpose, is a principal offender, although he is not actually present at the time the offence is committed.

* [26]

S.C. 7. Mod. 129.
S.C. 2. Salk. 542.
S. C. Holt, 215.
S.C. 2. Ld. Ray. 842.

Hilary Term, 1. Queen Anne, In B. R.

THE QUEEN
against
WHISTLER.

23. *Edw. 1.* whereby it is provided against trespassers in parks, "that if any be thereof attainted, great amends shall be awarded; and he shall have three years imprisonment, &c.;" here commanders are not mentioned, but they are adjudged trespassers.

POWYS, *Justice*. I think all persons aiding and assisting, though not present, yet they are within the statute. By 3. *Edw. 1. c. 20. De Malefactoribus in Parcis*, it was enacted, "that the party should make amends, suffer fine and imprisonment, and find sureties;" yet I do not take aiders were within that statute. But the words "aiders and assisters" are in this statute. But if those words were not there, the defendant would not be in the statute, because it is a penal statute, and not to be extended farther than an easy interpretation will bear: yet I think it shall be extended farther than to those present; for if a man persuade to kill, and lend dogs and horses, and they are used accordingly, he is aiding therein. Lord Coke (a) says, the word "aider" may comprehend all persons encouraging, though not present. In the case of *Evans v. Finch* (b), upon the statute 39. *Eliz.* which takes away clergy from those that break a house and steal above the value of five shillings, one gets by a ladder into the house, and the other only stands upon the ladder, but does not go in, IT IS RESOLVED, that clergy is not taken from him that did not enter the house: but that comes not to this case, the word "aiders" not being in that statute. There are also several statutes wherein aiders are mentioned, and yet not construed to extend to those that are absent; but they are answered by distinguishing betwixt acts relating to felony and acts that relate to other crimes. Those that relate to felony are taken strictly in favour of life; and also because it would otherwise confound the species of crimes, and make accessories and principals the same; for that an accessory * may be in felony, but in trespass all are principals. The preamble of this act makes it appear to be a remedial act; and none of the former statutes having reached to this case, therefore the very words "aiding and assisting" were put in to reach the very mischief mentioned in the preamble.

* [27]

POWELL, *Justice*, held it to be a good conviction.—An objection has been made that this is a penal law, and the penalty is not annexed to the offence, but to the person of the offender, and their aiders and abettors therein; and thence it was urged, that he that is not present, but incites others to do the fact, is not within the words of the statute; but if it had been annexed to the offence, it would have extended to all that were abettors thereto, as well as therein. I shall not urge it from the preamble, it being a penal statute, and not to be expounded by equity; but I think he is within the letter of the statute; he is "an aider therein" as much as if he were present at the fact. Where a felony is made by act of parliament, there will be accessories both before and after the

(a) 2. Inst. 182.

(b) Cro. Car. 473.

fact.

Hilary Term, 1. Queen Anne, In B. R.

THE QUEEN
against
WHISTLER.

fact. By the statute of *Westminster the Second* (a), if a man commit a rape, he shall have judgment of life and member: nothing can be more penal than that, yet nobody doubts but *aiders* are *ravishers* (b); and a woman has been, for that reason, adjudged a ravisher (c). The statute *De Malefactoribus in Parcis* is a penal law. The words are "trespassers in parks;" and the first question that arose on that statute was in the thirty-third year of *Edward the First* (d), and there it was adjudged to be intended only of misfeasances in hunting, and not taking away cattle. Then came another case, in the fifth year of *Henry the Fifth* (e), where the jury found, that the defendant did break the park in order to hunt, but he killed no deer; and yet adjudged he was a hunter within that statute. In the thirteenth year of *Henry the Seventh* (f), another action was brought on that statute; and it was adjudged, that requesting another to hunt was hunting himself; though that was a penal law. In *felony*, the *procurer* would have been an accessory, and why not in a *misdemeanor*? The case of *Evans and Finch* (g) seems only to go on this distinction, where clergy is taken from the offence, and where from the party *offending; for where it is taken from the offence, it is taken from all that aid thereto; but if taken from the person entering into the house, that case says, it shall not be taken from the aider or assister; but that was a case in favour of life (h); and I know not whether it will be a case to rule others by (i).

* [28]

HOLT, *Chief Justice*, differed from the rest. A *penal statute* is not to be expounded by *equity*; but you must adhere to the words (k), though the fact may be within the reason of the statute, and of as heinous a nature as that intended to be punished. That this is a *penal statute* is without all question, for there is a penalty; and the trial is put out of the common way by *MAGNA CHARTA*, by the *parcs* or peers; and this being subjected to a private jurisdiction, before a private justice in his house or chamber, we ought to adhere strictly to the letter. Since then the preamble

(a) 13. *Edw.* 1. c. 34. the words of which are, "If a man do ravish a woman married, maid, or other, when she did not consent neither before nor after, he shall have judgment of life and member; and likewise when a man doth ravish a woman married, lady, damsel, or other, with force, although she consent after."

(b) An act, says Lord Hale, that makes an offence by name, as rape, &c. to be felony, virtually makes all that are present aiding and assisting principals, though one only doth the fact. 1. Hale P. C. 704.

(c) Year-Book 3. *Hen.* 7. c. 2.—But see Year-Book 9. *Edw.* 4. fo. 26. Bro. Abr. "Indictment," pl. 7. Foster C. L. App. 423, 424.

(d) Year-Book 33. *Edw.* 1. fo. 11.

(e) Year-Book 5. *Hen.* 5. fo. 1.

(f) Year Book 13. *Hen.* 7. 12, 13.

(g) Cro. Car. 473.—See also 1. Hale P. C. 526. 528. 537. 2. Hale P. C. 359.

(h) LORD HALE says, when a statute ousts clergy, it is only so far ousted, and only in such cases, and to such persons, as are expressly comprized within the statute; for in *favorem vite et privilegii clericalis* such statutes are construed literally and strictly. 2. Hale P. C. 335, 336.

(i) See 4. Hawk. P. C. ch. 33. l. 98. page 280.

(k) See 11. Co. 37. 2. Hale P. C. 336. Foster C. L. 130. App. to Foster, 423.

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THE QUEEN
against
WHISTLER.

* [29]

is not sufficient to bring this man within the penalty, there are no words in the statute that can do it ; for though in the preamble of the statute there is a mischief recited, which is " combining and " confederating," yet there are no words in the statute which inflict a penalty on combining and confederating. Then consider the words of the statute, and they are, " aiders, abettors, and assisters " therein ;" in the fact ; not " aiders, &c. thereto," but in the fact. A man lends his horse and dogs to hunt, he is an *aidor* thereto, but he does not assist in it. If the law take away clergy from him that shall commit murder, &c. aiders, abettors, and assisters, yet you will not take it from accessories. It is observed, that this is of an inferior nature to felony, and is only a trespass. It is true, if the statute had inflicted the penalty under the name of a *trespass in parks* only, then the commanders and abettors before, as well as those present, would have been comprehended, because they are by law trespassers. And the statute *De Malefactoribus in Parcis* makes it penal, not because it is done in a special manner, but because it is a trespass in the park. But here the statute sets forth the offence in particular * circumstances ; and the penalty is inflicted, not as it is a trespass at large, but as it is so distinguished. As to the case of *Rex v. Evans and Finch* (a), that the statute takes away clergy from him that breaks the house, and takes away to the value of five shillings, two go together, one breaks the house, and the other stands upon the watch, they are both principals in this ; but clergy is taken away, not on account of the felony only, but on account of the felony with these circumstances of entering and taking away. But if clergy be taken away from *burglary*, it is not only taken from him that breaks, but from him that stands by ; and it is taken away from all that are guilty of that crime that is contained in the burglary (b). But if clergy be taken away from him that *robs* on the highway, and assaults in such a manner, he that stands by shall not lose his clergy. If an act of parliament make that a felony which was before but a trespass, the species and nature of the fact is changed ; therefore the abettors must be felons, because they cannot be trespassers ; and so if an act of parliament should make that treason which before was only felony, those who before were only accessories would now become principals, because the species of the crime is changed ; but this act of parliament does not alter the nature of the crime, but only inflicts a higher penalty ; and therefore ought to be taken strictly in those circumstances that are prescribed. Therefore I cannot agree to extend it beyond the letter, and do think it not to be a good conviction.

But judgment was entered according to the opinion of the other three Justices (c).

(a) Cro. Car. 473.

(b) See Appendix to the third edition of Foster's C. L. 421.

(c) See the case of *Midwinter v. Sims*,

Foster's C. L. 3d edit. App. 415. and *Rex v. John Royce*, 4. Burr. 2073. to 2086.

TRINITY TERM,

The Second of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Sir John Hawles, *Knt. Solicitor General.*

* Johnson *against* Shippin.

* [30]

Cafe 40.

PROHIBITION was prayed to THE ADMIRALTY for libelling against a ship, upon a suggestion, that the contract was made at land, *viz.* at *Boston* in *New England*.

But it appeared the ship was so damaged by a storm, that the master was forced to *hypothecate* part of her for necessaries taken up at *Boston* aforesaid, to supply the damage done by the stress of weather;

Whereupon a prohibition was refused:

AND IT WAS RESOLVED, that when a ship in a voyage is in distress, this Court will allow the admiralty jurisdiction in case of an *hypothecation*; because this Court cannot give the party so proper a remedy as the maritime law can. Besides, the original cause was by reason of the distress; and where shall a master hypothecate his ship, unless he do it upon land (a): for it is absurd to suppose him to meet a ship on the sea able to supply him with necessaries; and what security can the master be supposed to give, unless he

An hypothecation bond given at land by the master of a vessel, for necessaries to supply damage done by stress of weather at sea, is good.

S. C. Salk. 35.
S. C. 6. Mod. 79.
S. C. Holt, 48.
S. C. 2. Ld. Ray. 982.
1. Sid. 418.
1. Vent. 32.
1. Lev. 267.
Hob. 12. 115.
1. Com. Dig. "Admiralty" (E. 10.).

(a) See *Leicester v. Baxter*, Stra. 691.
1. Ld. Ray. 578. *Sampson v. Bragington*, 1. Vezey, 443. *Benson v. Jef-*

series, 1. Ld. Ray. 152. *Justin v. Ballam*, 2. Ld. Ray. 805. *Wilson v. Bird*, 1. Ld. Raym. 22.

Trinity Term, 2. Queen Anne, In B. R.

JOHNSON
against
SHIPPIN.

hypothecate the ship. For though the maritime law does not allow the master to sell her, yet it allows him to mortgage her for the reasons and occasions aforesaid, though he is no owner of her, which our law is absolutely a stranger to; so that should THE ADMIRALTY be prohibited, their law, *quoad* hypothecation, falls to the ground, which THE COURT said would be a great inconvenience (*a*).

(*a*) See *Osman v. Wells*, post. 31. *Hyde v. Partridge*, post. 43. and the case of *Menetone v. Gibbons*; in which last case it is determined, "on the authority of the principal case, that the court

of admiralty has cognizance of an hypothecation bond given in the course of a voyage, though it was executed on land and is *under seal*. 3. Term Rep. 367.

MICHAELMAS

MICHAELMAS TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

} *Justices.*

* *Osman against Wells and Others.*

* [31]

Cafe 41.

MR. WHITAKER moved for a prohibition to THE ADMIRALTY, for libelling against the body of a ship in the River Thames for *mariners wages*, and that had never been *extra corpus comitatûs*.

The suggestion was, that a *ship-wright* was in treaty with the captain for the sale of the ship; and as a trial of a ship, it is usual for the captain to go on board, and to bring mariners with him, and to employ them about the ship, and then to launch her, &c. Afterwards they disagreed before the property was altered; and the workmanship was removed from the ship, and the hull returned to the ship-wright.

THE QUESTION in this case now was, Whether it was within the reason and rule of *mariners wages*, the ship not being benefited by the men's work?

And THE COURT at first thought it somewhat difficult, and ordered it to be spoke to again this Term.

DEE, *Common Serjeant*, then argued that a prohibition ought not to go; for that the libel was directly for *seamens wages*, and

Cro. Car. 296. Hob. 11. 1. Roll. Abr. 530. 1. Salk. 34. 2. Show. 86. 3. Mod. 244. Comp. Rep. 74. 137. Stra. 707. 858. 937. 1. Com. Dig. "Admiralty" (E. 15.).

D 2

seven

Seamen employed in the river Thames in the out-fit of a ship, may sue in the admiralty for their wages, although from a disagreement between the owners they are discharged while lying in the river, and although the voyage, for which they were hired, was never performed.

S. C. 6. Mod. 238. S. C. 2. Ld. Ray. 1044, 1045. S. C. 12. Mod. 405. 3. Mod. 244. Comp.

Michaelmas Term, 3. Queen Anne, In B. R.

OSMAN
against
WELLS
AND OTHERS.

seven or eight of them joined in the suit; and although the voyage was prevented by the disagreement between the ship-wright and the master, yet upon account of the intended voyage the seamen came in as mariners, in order to a voyage, and the disagreement between the parties shall not prejudice the seamen; for they shall not be driven to their action at law, where they must severally sue upon the contract.

* [32]

* MR. AYRES said, if a prohibition did not go, it would be of very ill consequence to builders:

BUT THE COURT answered, that when the builder credited the master with the ship (*a*), he ought to take a bond to indemnify it against the mariners wages (*b*).

THEN HE OBJECTED, that there ought to have been a voyage to be a foundation for the admiralty's jurisdiction; because the libel says, for work done at sea. He cited a case in 1. *Keb.* 552. where a prohibition was granted for libelling against a ship, for tackle bought in the *Thames*, supposing in the suggestion *infra corpus comitatûs*:

BUT THE COURT held that prohibition to be upon the contract, and not like this case.

THEN HE CITED the case of *Coke v. Crotchet* (*c*), where a prohibition was prayed to stay a suit in the admiralty for *mariners wages*, upon suggestion that the suit was founded upon a *charter-party* made at land, and not upon the high sea (*d*); but the prohibition was denied, the suit being for mariners wages, which accrued due for their labour done *at sea*, and the charter and contract made upon land was only to ascertain them:

BUT though in this case there was no work done *at sea*, yet inasmuch as upon the face of the libel it appeared the suit was for seamen's wages, and for the indulgence due to mariners, ALL THE COURT WERE OF OPINION the admiralty had a jurisdiction, and so denied a prohibition; which is a stronger case than the case in *Levinz* above cited (*e*).

(a) See *Buxton v. Snee*, 1. *Vezzy*, 154.

(b) See *Clay v. Snelgrave*, 1. *Ld. Ray.* 576.

(c) 3. *Lev.* 60.

(d) *Salk.* 31. 1. *Vent.* 343. 2. *Str.* 968. 2. *Ld. Ray.* 1206. 4. *Burr.* 1944; and the statute 31. *Geo.* 3. c. 39. f. 1.

(e) See the case of *Clay v. Sudgrave*, 1. *Salk.* 33. *Read v. Chapman*, *Str.* 937. *Ragg v. King*, *Str.* 858. *Wheeler v. Thompson*, *Str.* 707. *Ross v. Walker*, 2. *Wilson*, 264. *Howe v. Nappier*, 4. *Burr.* 1945.

Case 42.

An attorney grants a replevin of his own goods; it is ill.

Trevannian's Case.

MR. AYRES moved for leave to file an information against one *Trevannian*, an attorney, for assuming to himself an authority of granting *replevins*, whereby he, in his own case, granted a replevin for his own goods. This MR. AYRES urged to be a great

Michaelmas Term, 3. Queen Anne, In B. R.

great misdemeanor; and that to usurp an authority, as to hold a TREVANNIAN CASE. LEET, and summons people in, and the like, is punishable by information, &c.

BUT THE COURT denied the motion at first, because there was another remedy, viz. by a *parco facto*, this being a pound-breach: See Jasper v. Eddowes, Ante, 21.

But * afterwards they ordered him to shew cause, &c.

* [33]

NOTE, As no *under-sheriff* ought to practise as a *common attorney*, so no *attorney* ought to practise as *under-sheriff* in granting replevins; &c.

Morris against Spencer.

Case 43.

UPON A WRIT OF ERROR, the exception taken to the bail was within *twenty days*, but the rule was served after the twenty days past, which the plaintiff in error thought was irregular, and so did not put in better bail; whereupon the defendant in error took out execution; which Rules about bail in writs of error. Tidd's Pract. 135.

THE COURT, on solemn debate, held to be irregular; and ordered this case, with the following matter, to be the standing rule for the practice:

FIRST, That exception to the bail in a writ of error must be taken within twenty days.

SECONDLY, Before execution can go out for want of better bail, the rule ought to be served.

THIRDLY, The not serving the rule within twenty days is not material nor inconvenient; because it is only in delay of the plaintiff in error himself.

The Queen against Sir Jacob Banks.

Case 44.

SIR JACOB BANKS was indicted at the quarter sessions in *Berkshire*, for an assault upon *Mr. Culpepper*, which was removed hither by the prosecutor by *certiorari*: If a prosecutor remove an indictment found at sessions into the king's bench, and the defendant obtain a *writ prius* from the attorney-general, and carry it down at the next assizes by *proviso* without leave first obtained from the Court, and is thereon acquitted, the Court will grant a new trial.—S. C. 2. Ld. Ray. 1082. S. C. Salk. 652. S. C. 6. Mod. 245. 1. Salk. 380. 1. Burr. 11. 54. 3. Burr. 1462. 1. Bac. Abr. 353. 682.

The prosecutor not carrying it down next assizes, the defendant, the same assizes, carried it down and tried it, and the defendant was found not guilty.

MR. NOTT moved to set aside the trial, there not having been any laches in the prosecutor.

POWELL, *Justice*, said, the trying it the very next assizes was too soon; and there could not be any laches in the queen, nor any trial carried down by *PROVISO* against her.

ted, the Court will grant a new trial.—S. C. 2. Ld. Ray. 1082. S. C. Salk. 652. S. C. 6. Mod. 245. 1. Salk. 380. 1. Burr. 11. 54. 3. Burr. 1462. 1. Bac. Abr. 353. 682.

Michaelmas Term, 3. Queen Anne, In B. R.

THE QUEEN
against
SIR JACOB
BANKS.

BUT THE QUESTION WAS; Whether THE ATTORNEY-GENERAL by his warrant, giving consent to a trial at *nisi prius*, should not imply his consent throughout ?

* [34]

HOLT, *Chief Justice*, said, MR. ATTORNEY's warrant was only a general warrant to * try it at *nisi prius*, and was more of course, than upon enquiry into the merits of the cause.

MR. ATTORNEY said, he was no otherwise concerned than to give the same general warrant he did in all cases.

HOLT, *Chief Justice*, said, it was his opinion, that where a prosecutor removes an indictment, it is very hard the defendant should *nolens volens* carry it down the next assizes and try it, when perhaps the prosecutor cannot be ready with his evidences. Suppose it was for treason or felony, this would put the queen in a worse case than any subject.

POWELL, POWYS, and GOULD, *Justices*, agreed to what HOLT, *Chief Justice*, said ; and that none of the precedents quoted by THE SOLICITOR GENERAL, who was Counsel for the defendant, were above five years standing, and those passed *sub silentio* :

SO ALL WERE OF OPINION, that a new trial ought to be :

And HOLT, *Chief Justice*, said, that no criminal can carry down a *venire* by PROVISO (a) ; but he ought properly to move the Court for relief, in case a process hangs over his head, that the Court may see if there be any laches or neglect in the prosecutor or not ; and such motion they should never grant upon the first instance or hearing, but give time to shew cause.

And so they set aside the trial.

(a) But see the case of *Knevit v. Taylor*, 2. Leon. 110.

Case 45.

Anonymous.

A plea must answer the whole declaration.

DEBT UPON A BOND for payment of five hundred pounds. The defendant pleads payment of two hundred and twenty-five pounds, part of the said five hundred pounds ; to this the plaintiff demurs ;

And PER TOTAM CURIAM adjudged to be a *discontinuance* ; because he had only answered to part of the demand (a).

(a) *Harlakenden's Case*, 4. Co. 62. *Swinstead v. Lydall*, 5. Mod. 295. *Afcue v. Sanderfon*, Cro. Eliz. 433. *S. C. Salk.* 408. *Taylor v. Cole*, 3. Term Rep. 292. *Thornhil v. Lascells*, Cro. Jac. 27. *Pendlebury v. Elnot*, Cro. Eliz. 268.

Clerk

Clerk against Withers, Sheriff, &c.

Case 46.

THE CASE was this: *A.* recovers three hundred pounds as administrator of *J. S.* against the plaintiff *Clerk*, and thereupon sues out a *fiery facias* to the sheriff of *Middlesex*, who levied goods sufficient. *A.* before the return of the * writ dies, the goods remained in the sheriffs hands *pro defectu emptorum*. The sheriffs went out of their office, and new ones were made. *Clerk* brings a *scire facias* against one of the old sheriffs in the common pleas, to have restitution of his goods, and judgment was there given against him; whereupon he brought a writ of error in the queen's bench.

If a sheriff levy goods under a *fiery facias*, and before sale his office expires, yet the defendant cannot reclaim the goods, although the plaintiff died before the return of the writ, for the defendant is completely divested of them by the levy, and the sheriff, throughout of office, may sell them without a *venditioni exponas*, or, if he will not, he may be compelled by a *disfringas* directed to the new sheriff.

GOULD, *Justice*, said, judgment ought to be affirmed, because *Mr. Clerk* is discharged of the debt, for he may plead "levied, &c." (a). It is plain, he said, the sheriff may sell the goods, though he be out of his office, as in the case of *Ayre v. Aden* (b), and *Cleve v. Vere* (c); for so soon as the sheriff has seized, he has such a property, as that he may maintain trespass or trover against the owner himself, as in the case of *Tyrl v. Bass* (d). And after a *fiery facias* or *elegit* executed, if the plaintiff die, the administrator, or in this case the administrator *de bonis non*, shall have the goods, or an action against the sheriff; and it is not like an extent, where a *liberate* must go.

POWYS, *Justice*, agreed with GOULD, *Justice*; and so did POWELL, *Justice*, and said the *scire facias* did not lie (e); because the execution was in part executed, by levying the goods in the life of the administrator; and if one sheriff levy, the succeeding sheriff shall not go on with it, but the old sheriff; for after once goods are levied, it is not a *superfedeas*, but only a writ of error can stop the completion of the execution: besides, here is no further award of the Court; for a *venditioni exponas* is no award of the Court. Then if it be asked, What shall become of the money when it is brought into court? It shall be as money recovered in the intestate's life-time, and shall go to such person as the Court shall be apprized has right to it, by administration *de bonis non*, or otherwise.

HOLT, *Chief Justice*, was of the same opinion. For no *scire facias* lies after seizure; nothing else is to be done by the sheriff to the plaintiff, but to bring the money into court at the return of the writ; and this he may do, notwithstanding the plaintiff's death, if the goods were seized in his life-time. Then if after seizure the sheriff is out of his office, yet he is bound to make sale of

S. C. Salk. 322.
S. C. 6. Mod.
290.
S. C. Holt, 303.
646.
S. C. 2. Ld. Ray.
1072.

(a) 1. Lut. 538. 3. Cro. 208. 237.
390. 36. Car. 2. Roll. 540.

(b) Cro. Jac. 73. S. C. Moor, 537.
S. C. Yelv. 44. S. C. 3. Danv. Abr.
320.

(c) 1. Jones, 386. S. C. Cro. Car. 450.

(d) Cro. Eliz. 639.

(e) See *Mildmay v. Smith*, 2. Saund.
343, that if the sheriff suffers the goods
to be rescued, a *scire facias* lies against him
after he is out of his office.

CLERK
against
WITHERS,
SHERIFF, &c.

See 2. Cro. 515.
1 Sid. 407, 99.
1. Cro. 166.
2. Roll. Ab. 491.
2. Vent. 439.
Dyer, 186.
Noy, 73.
1. Sid. 29.

them; and to * say they are in his hands for want of buyers, is not a discharge but an excuse only; for he has an authority to sell without a *venditioni exponas*, which is to compel him to do it (a). And the proper remedy is by *disfringas* to the new sheriff, to distrain the old one to sell (b), and shall return issues upon him if he do not (c). Now if a sheriff had an authority without a *venditioni exponas*, it is unreasonable to force him by a compulsory writ to do it. Another sort of *disfringas* is in *Rastal* (d). If a sheriff return goods to a value, and then they are lost or rescued, he is bound to make them good to the value returned, and debt lies against him, as in the case of *Mildmay v. Smith* (e). Before sale the defendant is actually discharged; for the goods are taken in lieu of the debt, and the plaintiff has no remedy but against the sheriff. Where a *scire facias* or *extent* is sued out, and before inquisition taken the plaintiff dies, there, upon the return of *the extent*, the administrator *de bonis non* shall not have a *liberate*; but otherwise if he die after inquisition taken.

Whereupon judgment in the common pleas was affirmed.

(a) Ayre v. Aden, Cro. Jac. 73.
S. C. Yelv. 44. Jenner v. Wilkins,
1. Vezey, 195. Wilbraham v. Snow,
1. Lev. 282. S. C. 1. Mod. 30.

(b) The 34. Hen. 6. c. 36. is the very
precedent; see also Tidd's Practice, 163.
747. Gilb. Execut. 21.

(c) See 10. Geo. 3. c. 50. and Tidd's
Pract. 165. Impey Pract. 134.

(d) Rastal's Ent. 164.

(e) 2. Saund. 343.

Cafe 47.

Cragger against Glover.

A prisoner discharged on the late statute, and after arrested for a debt of above 100l. due before the discharge, must find special bail.

See 6. Mod. 22.
Salk. 345. 521.
S. C. 3. Salk. 56.
S. C. 6. Mod. 301.
S. C. 2. Ld. Ray.
1088.

HOLT, Chief Justice, delivered the opinion of this Court, and also of the Judges of the common pleas, whom he said he had consulted, in the following case.

The case was this: J. S. is in gaol for twenty pounds and no more, and is discharged by the statute 2. Ann. c. .; then after such discharge he is arrested for a debt of above a hundred pounds, due before the discharge.

THE QUESTION was, Whether he should be discharged again without special bail?

He said it seemed doubtful, because of the words in the statute, viz. "for any debt whatsoever." But then THE PROVISIO is to be considered, which is, "PROVIDED that no man shall be discharged by virtue of this act, if he stand charged AND be indebted above one hundred pounds." Now it is objected, that this shall be applied to the first discharge only: but he said, it ought to be applied to the second * discharge as well as to the first; for he that is a second time discharged, is as much discharged by virtue of this act, as he that is discharged the first time. Besides, it was the intent of the act, that no man shall be discharged that owed above a hundred pounds. Nor can the discharge of the other debts be a discharge in this wherewith he was never charged.

HILARY

HILARY TERM,

The Third of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

Green, Executor, against Crane.

Case 48.

ACTION ON THE CASE was brought by an executor, upon several promises laid to have been made to the testator. The defendant pleaded the statute of Limitations; upon which issue was joined.

It appeared upon evidence, that the testator had been dead *seven years* before the action was brought: but the executor gave in evidence, a promise made to himself within one year, which was the point saved at the trial: a verdict was given for the plaintiff.

And *PER TOTAM CURIAM*, although the owning of the debt is a continuation of it, and takes away all presumption of its having ever been paid, and consequently brings it out of the statute (*a*), yet this verdict did not maintain the issue:

And it was set aside, because the promise being made to the executor, could not be made to the testator *infra sex annos* (*b*).

S. C. 1. Salk. 29. 2. Vent. 152. Ld. Ray. 389. 5. Mod. 425. 12. Mod. 223.

(*a*) Bull. N. P. 148. 3. Bac. Abr. 517. Cowp. 548. Yea v. Fomaker, 2. Burr. 1099. Lloyd v. Maund, 2. Term Rep. 760.

(*b*) But in an *assumpsit* by an executor on a promise made to the testator above six years before the action brought, if the defendant say to the executor within

the six years, "Prove that I had the goods "and I will pay you," and he proves it on this trial, this promise will maintain the issue of *non assumpsit infra sex annos*. Heylin v. Hastings, Carth. 470. S. C. 1. Ld. Ray. 389. 421. S. C. Comy. Rep. 55.

Promise laid as made to the testator, who had been dead *seven years*; the defendant pleads *non assumpsit infra sex annos*; the plaintiff proves a promise to himself within four years; this does not maintain the issue.
S. C. 2. Ld. Ray. 1101.
S. C. 6. Mod. 309.
Gilb. Evid. 178.

Blackmore

Case 49.

* Blackmore against Tiddlerley.

Trinity Term, 3. Anne, Roll 231.

To an action of assault and battery A PLEA of no assault within six years, is bad; for the 21. Jac. 1. c. 16. limits it to four years, and the statute must be precisely, and not argumentatively pleaded.

S. C. Salk. 423.
S. C. 6. Mod. 240.
S. C. 2. Ld Ray. 309.
6. Mod. 309.
Carth. 3. 136.
Ld. Ray. 435.

ACTION OF ASSAULT AND BATTERY. The defendant pleaded no assault, &c. *infra sex annos* (which by the statute 21. Jac. 1. c. 16. is limited to *four years*). The plaintiff demurs; the defendant joins in demurrer.

And **PER TOTAM CURIAM**; judgment was given for the plaintiff. For though this was an argumentative plea, *viz.* that what was not done within *six years* could not be done within *four years*; yet suppose they had joined issue, and a verdict had been; that it was within *five years*, the Court could not have given judgment for the plaintiff: and should such argumentative pleas be allowed or countenanced, they would inveigle the Court in their judgments:

And therefore **IT WAS RESOLVED**, that the plea of the statute of Limitations should be precise and direct; for **THE COURT** said, there was no such statute as to bar an action of assault and battery not done *infra sex annos*; but the statute is express *infra quatuor annos*, &c.

Whereupon judgment was given *ut supra*.

Case 50.

Wangford, Legatee of Thomas Shelly, *against* Wangford, Debtor and Executor to Shelly.

If an obligee make the obligor his executor, it is a release of the debt, although he dies before probate granted.

S. C. Salk. 299.
S. C. 3. Salk. 162.
S. C. Holt, 311.
S. C. 1. Freeman. 320.

ERROR ON A JUDGMENT given in the common pleas.

THE CASE was in short this: The obligee made his obligor executor, who accepted of the executorship, by his administering, but died before probate.

The question was, Whether this is a release of the debt?

The judgment in the court of common pleas was, that it was a release.

Upon which a writ of error was brought here, where the Judges *seriatim* gave their opinions, that the judgment in the common pleas was well given.

And first **GOULD, Justice**, said, it must be agreed, that if the executor of the obligee had proved the will, it would have been a release; and urged, that the non probate * would not alter the case; and he relied much upon these cases, which he said were strong in point: 20. Ed. 4. 17. a. 21. Ed. 4. ca. 4. fo. 3. and *Preced. Com.* 184. Again, he said, he is executor to all intents and

Hilary Term, 3. Queen Anne, In B. R.

and purposes before probate (a), save only to the prosecuting of actions (b); and by his once taking upon him the administration, he has so bound himself that he can never after refuse (c). But if an obligor executor would refuse before THE ORDINARY to accept of the executorship, without having before meddled, then he held, the act of the testator would not *volens* amount to a release.

WANGFORD;
LEGATEE OF
THOMAS
SHELLY,
against
WANGFORD,
DEBTOR AND
EXECUTOR TO
SHELLY.

POWYS, *Justice*, said, an executor has before probate a very large and ample power; and cited *Middleton's Case* (d); for before probate an executor may release a debt (e), which an administrator cannot do; for the executor commences by an act temporal, originally by the will, but an administrator commences from the letters of administration, and so the diversity, *Plowd. Com.* 280. 1. *Roll's Abridg.* 917. 36. *Hen.* 6. pl. 7. 1. *Mod. Rep.* 213. *Dyer*, 367. *Hutt. Rep.* 30, 31. *Cro. Jac.* 614. 1. *Vent.* 303. is reconciled. If an executor refuse to accept the executorship, and is a debtor, the administrator may sue him (f); for he said, it was no release of the debt, contrary to the sudden opinion of TWISDEN, *Justice*, in the case of *Abram v. Cunningham* (g). But he took a difference between an actual refusal, and not meddling with the executorship for a time; for if A. make a deed to the use of B. it is A.'s deed until B. refuses (h).

POWELL, *Justice*, first of all cited the case in the Year-Book of *Edward the Fourth* (i), and said, abundance of cases agree, that if the debtee make the debtor executor, who proves the will, the debt is for ever gone, because it is the very act of the testator himself (k); and therefore if it is only suspended, it being his act, it is for ever gone. Now if the proving the will is the only cause, then he said, it is very strange none of the books should take notice of it. But the reason given in them is, that a personal action once suspended is for ever gone. But it is plain the right of ac-

(a) See *Plowd.* 280. 9. *Co.* 38. *Co. Lit.* 292. and the case of *Parten v. Bafeden*, 1. *Mod.* 213. and *Middleton's Case*, 5. *Co.* 28.

(b) See 1. *Salk.* 302. 1. *Ld. Ray.* 364. 3. *Peer. Wms.* 349. 1. *Com. Dig.* "Administration" (B. 9.).

(c) That an executor *de son tort* cannot purge his tortious act, after an action is brought against him, by delivering over the goods of which he has taken possession to the rightful administrator, though he may discharge himself by delivering them over previous to the commencement of the action, see *Kemble v. Osbaston*, *Hob.* 49. *Bradbury v. Keynel*, *Cro. Eliz.* 565. *Paget v. Priest*, 2. *Term Rep.* 97. *Curtis v. Vernon*, 3. *Term Rep.* 587. *S. C.* 2. *H. Bl. Rep.* 18.

(d) 5. *Co.* 28.

(e) *Plowd.* 281. 1. *Roll. Abr.* 917.

(f) So if a debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator, *Rawlinson v. Shaw*, 3. *Term Rep.* 557.

(g) 1. *Vent.* 303. *S. C.* 2. *Lev.* 182. *S. C.* 2. *Mod.* 146. *S. C.* 2. *Jones*, 72. *S. C.* 3. *Keb.* 725. *S. C.* 1. *Freem.* 445. *S. C.* 3. *Danv.* 350.

(h) See *Butler and Baker's Case*, 3. *Co.* 26. b.

(i) Year Book 21. *Edw.* 4. pl. 3.

(k) See *Wentworth's Office of Executor*, 44. *Co. Lit.* 264. *notis.* 1. *Salk.* 305. 1. *Roll. Abr.* 943. *Cro. Car.* 373. 1. *Com. Dig.* "Administration" (B. 5.). 4. *Brown P. C.* 179. 8. *Viner Abr.* 198. 2. *Eq. Cases Abr.* 461.

WANGFORD,
LEGATEE OF
THOMAS
SHELLY,
against
WANGFORD,
DEBTOR AND
EXECUTOR TO
SHELLY.

NOTE, He
must declare
with a *proferit*,
&c.

tion is in him before probate, and therefore he may release; nay, he may * bring an action, though he cannot go on with it until he has obtained THE PROBATE under seal to produce in court (a). If the ordinary grant letters of administration to the obligor, it will suspend the action, but nothing further; because it is not the act of the obligee himself. If an executor die before probate, his executor shall not be executor to the first testator. And he thought the cases in *Dyer*, 372. 1. *Leo*. 275. and *Plowd. Com.* 290. were the first that allowed of this; and he said, they were rather in compliance with the spiritual court than lawful; for an executor is an authority given by the first testator, and then what authority have the spiritual court, or the first executor, to make an executor to the first testator (b). Now as to the matter of the release, he said, it could not operate as such; for then it would not be assets, but rather as a legacy; and yet it would not be assets to legacies, except part of it was especially appointed to be paid away, for then it shews the intent. 1. *Roll Abr.* 920, 921. For a will cannot be said properly to be a release, but a gift, and so must be liable to debts. If the obligor make the obligee executor, who accepts it; now if there be *assets*, he may retain; if there be none, he may sue the heir, and so no suspension of his debt; for if his debt is extinguished, it is upon presumption of his being satisfied by retaining. *Plowd. Com.* 185.

HOLT, *Chief Justice*, said, before he gave his reasons for affirming the judgment, he would first give answers to three objections started at the bar. THE FIRST was, when a will is made, and the executor dies before probate, the spiritual court grant administration *cum testamento annexo*, without taking any notice of the administration by the executor. THE SECOND objection was, that it is the foundation for granting administration to the next of kin, that the executor died *ante onus testamenti super se assumpsit*. THE THIRD objection was, that such executor, making his executor, he cannot be executor to the first testator; but administration must be granted *cum testament. annex*. And as to the first objection, he said, the spiritual court could not take * notice of what an executor did, though all his acts were valid before probate. As to the second, that he died *ante onus testamenti super se assumpsit*; he said, that must be taken in a restrained sense, *viz. ante onus*, &c. taken upon him in their court. And as to the third objection, that an executor dying before probate, making his executor, that he shall not be executor to the first testator, is, because no man can prove the will of another who is not named executor, &c. in the will. *Cro. Jac.* 614.—His first reason for affirming the judgment was, that by the making him executor, he is intitled to receive and pay money due before probate; and being bound to receive and pay, he can-

(a) 5. Co. 28. 1. *Roll. Abr.* 917. *Hutton*, 30.

(b) See the case of *Heden v. Wolfe*, expressly in point. *Palm. Rep.* 153. 156.

S. C. under the name of *Haiton v. Wolfe* *Cro. Jac.* 614. 2. *Roll. Rep.* 248. See also *Flud v. Rumcey*, *Yelv.* 160.

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not pay himself, and so it operates as an extinguishment; but this rule is subject to several limitations; as if the obligor make the obligee executor, for he is not bound to pay unless he has *assets*, and then he may retain for his own debt. *11. Hen. 4. 83. Cro. Car. 372. Hil. 24. & 25. Car. 2. Cock v. Cross.* A second limitation; suppose the obligor take administration, he has as much right to receive as the executor; but then the one is the act of *the creditor*, the other of *the ordinary*, which is but a naked authority without any interest, as in *Sir John Needham's Case (a)*. A third limitation; if the executor of the obligee take the obligor to husband, this is no extinguishment. *Co. Lit. 264.* But if the obligee take the obligor to husband, it is; because it is in vain for the husband to pay money to his wife. But when the husband pays money to the wife executrix, there it shall not be the husband's money, if she dies, but the administrator's *de bonis non*. Another reason is, because it is *assets*; for it amounts to a payment; and enures as a release thereupon, contrary to *POWELL*, and is as much as if he had received so much money, and therefore is *assets* in his hands. Another reason is, by his accepting the administration he becomes a complete executor, though he dies before probate, and all the goods of the testator are, by act in law, vested in his possession, for which he may bring trover: nay, he may bring an action of debt before probate, and though it should appear that the probate * bears date after the bringing the action, yet it would be well enough (b). But in case he had gone into the spiritual court and refused, then it would not be a release; for no one shall be compelled to accept of a release, no more than of a deed: for the obligor may plead "*non est factum*" to the bond, but until actual refusal he is an executor, though he die before probate; and he cited *20. Edw. 4. 17. 21. Edw. 4. 3. Hardres, III.* and the *Lord Petre's Case*, which *HOLT, Chief Justice*, said was argued and resolved in *SERJEANTS-INN* about four years since.

WANGFORD,
LEGATEE OF
THOMAS
SHELLY,
against
WANGFORD,
DEBTOR AND
EXECUTOR TO
SHELLY,

* [42]

(a) 8. Co. 135.

(b) 1. Roll. Abr. 917.

THE HISTORY OF THE

REIGN OF
HIS MOST
EXCELLENT
MAGESTY
JAMES
THE FIRST
BY
JAMES
HARRISON

IN
SEVEN
VOLUMES
THE SECOND
VOLUME

LONDON
Printed by
J. STAMPEL
at the
Sign of the
Anchor in
St. Dunstons
Church-yard
1695

By Authority
of the
Council

Printed by
J. STAMPEL
at the
Sign of the
Anchor in
St. Dunstons
Church-yard
1695

E A S T E R T E R M,

The Fourth of Queen Anne,

I N

The Queen's Bench,

Sir John Holt, Knt. Chief Justice,

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

Sir Edward Northey, Knt. Attorney General,

Sir Simon Harcourt, Knt. Solicitor General,

} *Justices,*

Anonymous.

Case 51.

QUÆRE.—If a licence is granted to a man to use my ground or my yard, he thereby has an interest in it; so to a lease that the licence is not revocable, but it amounts to a lease *as will (a).*

5. Hen. 7. pl. 1.
Bro. Abr. "Li-
"cense" pl. 19.

And this seemed to be THE OPINION OF THE COURT, and that he thereby had such a possession, as not to be turned out by a revocation (b), but by an ejectment.

(a) See Year Book 5. Hen. 7. pl. 1.
Bro. Abr. "Licence" pl. 19. 15.
Viner Abr. 92. Hall v. Seabright,
1. Mod. 14. Green v. Proffor, 4. Burr.
2309.

(b) See Webb v. Paternoster, Poph.
151. The Queen v. Bartere, Dyer, 177.
Rex v. Lord Nottingham, Lane, 46.
Bagshaw v. Bosley, 4. Term Rep. 31.

Anonymous.

Case 52.

HOLT, *Chief Justice*, said, the justices of peace, in the case of forcible entries and detainers, ought to adjourn their courts and give the party an opportunity to traverse * the force, or else the party has no remedy but by *certiorari*; and every inquisition is traversable by the *Statute of Westminster (a)*.

Justice of
peace's power
in forcible en-
tries, &c.

* [43]

(a) See 3. Hawk. P. C. c. 64. l. 3. 53.

But

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ANONYMOUS. But generally the justices inquire into the possession only, and award restitution, without trying the forcible detainer, or entry, upon a traverse.

A tenant at will NOTE, A tenant at will cannot justify a forcible detainer, until he has been three years in possession (a); but he ought to quit possession, and apply to the justices for a restitution upon the forcible entry.

(a) See 31. *Eliz.* c. 11.

Case 53.

Cockcroft against Smith.

*Son assault de-
mesneis* not a good
plea where any
time intervenes
between the as-
saults, or where
the second as-
sault is *excessive*.
S. C. post. 52.

S. C. Salk. 642.
S. C. Holt, 699.
S. C. 6. Mod.
230.

COCKCROFT in a scuffle ran his finger towards *Smith's* eyes, who bit a joint off from the plaintiff's finger.

The question was, Whether this was a proper defence for the defendant to justify in an action of *mayhem*?

HOLT, Chief Justice, said, if a man strike another, who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case, *son assault* is no good plea; neither ought a man, in case of a small assault, give a violent or an unsuitable return; but in such case plead what is necessary for a man's defence, and not who struck first; though this, he said, has been the common practice, but this he wished was altered; for hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other, &c.

Case 54.

Hyde against Patridge.

A suit in the ad-
miralty for sea-
mens wages
must be brought
within six years
after the cause
of action arises.

* [44]
S. C. 2. Salk.
424.
S. C. 3. Salk.
227.
S. C. Holt, 428.
S. C. 2. *Ld Ray*.
1204.

THE QUESTION was, Whether the statute of Limitations, 21. *Jac.* 1. c. 16. extended to a suit in THE ADMIRALTY for seamen's wages?

DARNEL, Serjeant. That it did not; because it proceeded according to the civil law: and likewise, that it ought not to be construed according to equity, but to the letter; and in the statute there is no mention of this * court; and it restrains men's liberty that they had at the common law, and therefore such statutes ought to be taken strictly (a). Another reason he said was, he supposed the law-makers very well knew that there was a remedy, not only at our law, but in the admiralty too; and therefore, had they intended this statute should have extended to the admiralty, they would have mentioned it, especially since it proceeded by another law; and therefore by implication it ought not to extend to it. 1. *Roll. Abr.* 531.

(a) *Plowd.* 54. *Hutton*, 109. 2. *Vent.* 345 or 335. *Cro. Car.* 539. 1. *Mod.* 345, 296.

DEE,

Easter Term, 4. Queen Anne, In B. R.

DEE, *Common Serjeant, contra.* For that though the cause is marine, yet it is as much as if the suit was for a contract made at land. The common-law courts must take notice of it; the statute, he said, says, "any suit," and this proceeding can be no other than a suit; and the statute is pleadable in chancery.

HYDE
against
PATRIDGE.

HOLT, *Chief Justice*, said, if the contract is made *super altum mare*, the statute does not extend to THE ADMIRALTY; but if it be made upon the land, it does; and they have a necessary jurisdiction; because the ship is liable, by the marine law, until the owner come in and give *security* to abide the judgment, and then the ship is discharged, and the action becomes personal.

POWELL, *Justice*, said, the common law's indulgence to the admiralty is of so long standing that it is become a right; and it would be very hard to make this statute not to extend to any suit but at common law.

HOLT, *Chief Justice*, said, an action of debt or an award is out of the statute: but then the action must be brought for the money awarded, and not upon the *assumpsit* to stand to the award. The reason a legacy is out of the statute is, because it may be stopt till debts are paid (a).

(a) The point, whether the 21. Jac. 1. c. 16. extends to a suit in the admiralty for seamen's wages, was not determined; the case went off upon the form of the plea. S. C. 2. Ld. Ray. 1204. But now by 4. Ann. c. 16. s. 17. and 18. it is enacted, "That all suits and actions in the court of admiralty, for seamen's wages, shall be commenced within six years next after the cause of such suits or actions shall accrue, and not after:

" PROVIDED NEVERTHELESS, that if
" any person or persons intitled to such
" suit or action, shall be at the time it
" accrues within age, a *feme-covert*, non
" *compos mentis*, imprisoned, or beyond
" sea, he shall be at liberty to bring such
" action within six years after his at-
" taining age, being dis-covert, of sane
" memory, at large, or returned from
" beyond sea."

* [45]

* Anonymous.

Case 55.

A MAN brought to this court by *habeas corpus*, upon a commitment by the justices of peace, who have cognizance of the cause, is not bailable until the order is quashed; because until then he is in execution.

A commitment by a justice of peace is in execution.
Post. 52.

Anonymous.

Case 56.

IN the common pleas, upon A RECOGNIZANCE entered into there, a *feri facias* or *elegit* may go, but no *capias* lies; but otherwise in this court a *capias* lies, for here the bail is BODY FOR BODY.

No *capias* lies on a recognizance in the common pleas.

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Case 57.

Anonymous.

Declaration amended after issue.

Vide post. cont.

DARNEL, *Serjeant*, moved to amend a declaration, which was carried down to *Winchester* to be tried, but finding something necessary omitted in it, did not try it; and it not being, as he said, a record but only a paper, he prayed that it might be amended upon payment of costs.

Which was granted *nisi causa*. Absente HOLT, *Chief Justice*.

Case 58.

Anonymous.

If an action be brought on 23. *Eliz. c. 1.* three weeks after the year, yet if judgment be entered for the year only it is good.

HOOPER, *Serjeant*, moved in arrest of judgment, on a verdict upon the statute 23. *Eliz. c. 1.* for not coming to church for eleven months.

His exception was, that the statute requires the prosecution thereon to be brought within a year and a day, but this action was brought three weeks after the year, and the verdict was for the whole.

POWELL, *Justice*, told him, he put them, *i. e.* the other side, in mind of curing this mistake, they not having entered up their judgment; for he said, if they entered up their judgment for no more than was within the time limited by the act, *viz.* for no more months than were within the year, then it would not be error.

Case 59.

Anonymous.

Not repairing a farm.

HOLT, *Chief Justice*, said, if a farm is out of repair in the life of the ancestor, and afterwards the heir bring an action, he shall recover damages for the whole time; but the heir ought not to alledge a breach in the ancestor's time, because that belongs to the executor.

* [46]

Case 60.

* Anonymous.

Repleader.

TO put a matter of law in issue to a jury is void.

But HOLT, *Chief Justice*, said, it would be holpen by a verdict; where an issue is wholly immaterial, then there must be a repleader (a).

(a) See the case of Stapleton v. Heydon, 6. Mod. 1. Rex v. Phillips, 1. Burr. 295. 5. Com. Dig. "Pleader" (R. 18.).

Case 61.

Anonymous.

A parson cannot bring an action for tithes until he is inducted.—2.

IF A PARSON is instituted only, he cannot have an action of trespass until induction. Roll. Abr. 348. F. N. B. 36.

But

Easter Term, 4. Queen Anne, In B. R.

But **HOLT**, *Chief Justice*, said, he is intitled to the spiritual profits, as oblations, &c. before induction : he is likewise liable to be sued in the spiritual court before induction, if he neglect the cure ; but he cannot sue for great tithes before induction, for they are temporal.

ANONYMOUS.

Anonymous.

Case 62.

IF A BISHOP grant a patent to a man to be vicar general, wherein he reserves a jurisdiction to himself, it seems to be repugnant and void. So where a bishop grants his chancellorship with a reservation to himself of institution and induction.

A grant of the office of vicar general, with a reservation to the bishop, is void. Post. 62.

And **HOLT**, *Chief Justice*, said, what cannot a vicar general do ? for if he is restrained, he is not a vicar general.

2. Lev. 142.
4. Mod. 18.
Show. 289.

Colonel Layton's Case.

Case 63.

COLONEL LAYTON was brought into court by *habeas corpus*, having been committed by **THE LORD MAYOR OF LONDON**, on his own view, for a forcible entry into **THE FLEET PRISON**, and for a forcible detainer thereof.

A commitment by a lord mayor of London, on the view of a forcible detainer, subscribed "*A. B. mayor*," without adding "*and justice of the peace*," is good ; for by the statute 8. Hen. 6. c. 26. all mayors are made justices of peace.

The title *Layton* claimed by, was, that this prison was, by a judgment of this Court, seized into the queen's hands, under whom he claimed.

S. C. post. 59. 236.

SIR JAMES MOUNTAGUE excepted, that it did not appear that it was done by a justice of the peace, for the subscription was by "*Owen Buckingham, mayor*," and did not say "a justice of the peace."

S. C. Salk. 106.

RAYMOND. It is necessary that the person who commits for a forcible entry ought to intitle himself to a jurisdiction, by subscribing himself a justice of peace. *Lamb. 160.*

353. 450.

* **MR. ATTORNEY**, in answer to this objection, said, the Court would couple the warrant to the conviction ; for that, he said, was the reason of removing it hither by *certiorari* ; whereby it would appear to the Court that there was a judgment to found the warrant of commitment upon.

S. C. Fort. 173.

* [47]

BRODERICK, *Serjeant*. The lord mayor of London, *virtute officii*, before any acts of parliament for justices of the peace, was a conservator of the peace ; and thereof the Court will take notice, and also upon account of the statute 8. Hen. 6. c. 26. which makes all mayors justices of the peace ; and the warrant has a reference to the conviction ; and so long as the conviction stands, the warrant shall be supplied by a reference to that.

THE WHOLE COURT said, that this objection, of his signing mayor and not justice, was sufficiently answered, for that the de-

Easter Term, 4. Queen Anne, In B. R.

COLONEL
LAYTON'S
CASE.

fect was supplied by the statute *Henry the Sixth* which makes all mayors justices.

The same justice may make a record of forcible detainer, and fine the offender; but if he commits the offender, he must do it immediately upon the fact. *Keilway*, 41. 2. *Hawk. P. C.* c. 64. f. 8.

A SECOND EXCEPTION was, that a justice of the peace cannot set a fine by virtue of the statute 15. *Rich. 2. c. 2.* but ought to refer to the quarter-sessions, and cited *Band's Case (a)*. What power the justices have ought to be executed *eo instante*.

BRODERICK, *Serjeant*. By the record it appears all was done *eo instante*.

EYRE. This is a commitment in execution; the statute 15. *Rich. 2. c. 2.* is founded upon the statute 5. *Rich. 2. c. 7.* and so is the statute 8. *Hen. 6. c. 9.*

HOLT, *Chief Justice*, said, the justice of peace may set a fine, but he ought immediately to commit him where by his own view he finds a forcible detaining, and then, as he is a judge of the record, he may adjourn his court, and then set a fine upon him, and commit him in the mean time.

A THIRD EXCEPTION was, that it was said to be within the liberties, and not within the city itself; for the lord mayor has not jurisdiction every-where within the liberties.

On a record, on view, of a forcible detainer, the party may plead three years quiet possession. See 31. *Eliz. c. 11.*

HOLT, *Chief Justice*, said, upon a view of forcible detainer, the party may plead, that he and his ancestors have been in peaceable possession three years; and the justice ought to accept the plea, and try it as well in this case as in the case of restitution, and ought to stop restitution till such issue is tried. By the common law, he said, a man might defend his house by force and arms, for it is his castle; but these statutes restrain him.

To be spoke to again (b).

(a) *Cro. Jac. 41.*

the conviction was good. *S. C. Fort.*

(b) In Michaelmas Term 7. *Ann.* the Judges gave their opinions *seriatim*, that

* [48]

Cafe 64.

* Anonymous.

The spiritual court may proceed for calling a woman "brandy-nosed whore."

A PROHIBITION to the spiritual court was refused for calling a woman "brandy-nosed whore."

MR. EARL insisted upon several authorities, that calling a woman "whore" was only words of heat.

1. *Roll. Abr. 36.*
Cro. Jac. 499.
514.
Cro. Eliz. 582.
787. 1. *Sid. 50. 61.* 3. *Mod. 120.* *Salk. 696.* 2. *Mod. 296.* *Cro. Car. 393.* 1. *Mod. 31.*
4. *Vent. 21. 53.* *Carter, 55.* 1. *Lev. 205.*

BUT THE COURT were unanimous, that, notwithstanding the former practice, a prohibition should not go, for that it is a great defamation.

Smith

A DECLARATION on a special promise that he would pay so much money, in consideration that the plaintiff would deliver up such a bond; and avers, that he did deliver up the bond.

MR. AYRES objected, that he did not set forth that he gave notice to the defendant; and that it was not said to whom the bond was to be delivered: he cited the case of *Hopkins v. Slapers* (a), *Rolfe v. Sharp* (b).

SIR J. MOUNTAGUE *contra*, cited the case of *Price v. Hill* (c), and *Cole's Case* (d).

HOLT, Chief Justice. A general promise to pay money when a bond is delivered up, it must be intended to be delivered up to the obligor, though by a third person; and the defendant ought to take notice of the delivery, for he might have applied to the obligor to have had notice; for where either party might have had notice by their own inquiry, notice is not necessary. In case of marriage of oneself, notice need not be averred (e); because marriage is of itself notorious.

But POWELL, Justice, doubted.

Cowp. 825. 2. Bl. Rep. 853. 2. Term Rep. 45.

(a) Cro. Eliz. 229.

(d) Cro. Eliz. 97.

(b) Cro. Car. 77.

(e) Applethwait v. Nortley, Cro.

(c) 1. Lev. 137. S. C. 1. Keb. 760. Eliz. 229.

A declaration stating that the defendant promised to pay in consideration that the plaintiff would deliver up such a bond, averring generally that the bond was given up, is good, without stating notice to the defendant, or saying to whom the bond was delivered.

Yelv. 17.

Cro. Car. 194.

Cro. Jac. 552.

Cro. Eliz. 898.

Hard. 61.

March. 51.

Rep. 45.

The Mayor of Winchester *against* Willies.

Case 66.

IT is not reasonable always to inquire into the original ground or foundation of an antient custom. In a special verdict, wherein a custom was found to restrain any stranger from setting up a trade of a woollen draper, unless he was qualified according to the custom, &c.

It was questioned, Whether such a custom be good in any other city than London; it being a custom restraining the liberty of the subject in a matter so beneficial to the kingdom * as trade is.

DARNEL cited the case of the *Corporation of Dublin* (a), the case of *Joliffe v. Broad* (b), the case of *Day v. Savage* (c), the case of *Strode v. Birt* (d), the Year-Book of *Edward the Third* (e), and *Robinson v. Watkins* (f).

Palm. 1. 1. Salk. 193. 6. Com. Dig. "Trade" (D. 2.). 1. Com. Dig. "Bye Law" (C. 4.).

(a) Palm. Rep. 1. S. C. 1. Roll. Rep. 113. 125.

(d) 4. Mod. 418. S. C. 12. Mod. 97.

(b) 2. Roll. Rep. 201. S. C. Cro. Jac. 596. S. C. 1. Jones, 13. S. C. March, 77. S. C. Noy, 98.

S. C. Skin. 621. S. C. 3. Salk. 12.

S. C. Comy. 7.

(e) 8. Edw. 3. pl. 37.

(f) 4. Mod. 227.

(c) Hob. 85. S. C. Moor, 871. S. C. 2. Roll. Abr. 579.

A custom in restraint of trade, is ill.

S. C. 1. Salk.

203.

S. C. 3. Salk.

349.

S. C. Holt, 187.

* [49]

S. C. 2. Ld. Ray.

1129.

S. C. 6. Mod. 21.

11. Co. 53.

1. Leon. 262.

(C. 4.).

Easter Term, 4. Queen Anne, In B. R.

THE
MAYOR OF
WINCHESTER
against
WILKES.

MR. RAYMOND, that this custom is not good, cited *Waggener's Case* (a), the case of the *Taylor of Ipswich* (b), *Peplow v. Rowley* (c), *The Mayor of Bedford v. Fox* (d), and the Year-Book of *Henry the Sixth* (e). He insisted principally on *Waggener's Case*; and that great stress was laid on confirmations of acts of parliament in that case (f).

HOLT, Chief Justice. Whenever a town is incorporate, it is as well for the benefit of the inhabitants in general as a freeman, where it is for the benefit of a trade; and a by-law will extend to both. The city of *London* has a power to qualify persons, and to oblige infants, if they bound themselves, to stand to their indentures, notwithstanding their non-age; but there is no such custom anywhere else; which occasioned the statute 5. *Eliz. c.* which binds infants.

NOTE, The Court seemed to be of opinion it was a bad custom (g).

But judgment was given upon the defect of the declaration; for that the plaintiffs had not intitled themselves to the action.

POWELL, Justice, said, most of the corporations in *England* that are by prescription, assume this custom. But he gave no opinion of it.

(a) 3. Co. 121. S. C. 2. Brownl. 278. 284.

(b) 11. Co. 53.

(c) Cro. Jac. 357.

(d) 1. Lutw. 562.

(e) 2. Hen. 6. c. 5. pl. 26.

(f) See 3. Co. 125. 9. Co. 59. 1. Lev. 262. Cro. Eliz. 185. 803. Godb. 254. Lutw. 564. Carter, 69. 115.

(g) But see *Wannell v. Chamberlain of London*, Stra. 675. *Harrison v. Godman*, 1. Burr. 12. *Rex v. Harrison*, 3. Burr. 1312. S. C. 1. Bl. Rep. 372. *Woolley v. Idle*, 4. Burr. 1951. *Green v. The Mayor of Durham*, 1. Burr. 127. *Rex v. Surgeons Company*, 2. Burr. 392. *Pierce v. Bartrum*, Cowp. 269.

Case 67.

Sir William Drake against ———.

No special bail in scandal.

1. Sid. 183. 307.

1. Lev. 39.

A MOTION was made for a special writ, to be had by rule of Court, against a person, to hold him to special bail, for speaking very scandalous words against *Sir William Drake*, viz. "That he was a traitor, one of the hundred and thirty-four for bringing in the *Prince of Wales*, &c."

But THE COURT refused to grant it; and said it was refused in the *Lord Wharton's Case*, for scandal of a peer (a).

(a) See *Earl of Stamford v. Gordel*, 1. Sid. 183. and *Marquis of Dorchester's T. Raym. 74. Chetwyn v. Winner*, Case, 2. Mod. 215.

Case 68.

Anonymous.

The sheriff is answerable for the misconduct of his under officer.

SIR JAMES MOUNTAGUE moved the Court to amerce an under-bailiff of *Westminster*, for not making a return of a writ.

But

Easter Term, 4. Queen Anne, In B. R.

But THE COURT thought the motion improper ; for that the sheriff is the officer of this court. ANONYMOUS.

THE COURT in this case made a rule for the bailiffs to return it, * and for disobeying that, bring them into contempt.

* [50]

Luttin against Benin.

Cafe 69.

ACTION OF ESCAPE against A SERJEANT of *Wood-street Compter*; upon not guilty pleaded, it appeared that the action, on which he arrested the person who escaped, arose out of the jurisdiction; and the process was executed out of the jurisdiction.

An action lies against a serjeant at mace, for arresting a person on process from the sheriffs court in an action of debt on bond, if it appear that the bond was made out of the jurisdiction of the sheriffs court.

MR. AYRES. Where an inferior court holds plea of matters out of their jurisdiction, it is *coram non judice*. There is a difference between proceeding erroneously where they have jurisdiction, and where they have no jurisdiction (a). That actions will lie against officers appears from the averment necessary for the officer, viz. that the cause was *infra jurisdictionem* in order to justify; and if an inferior court hold plea of a matter out of their jurisdiction, all their proceedings are void, and *coram non judice*, and may be avoided by plea (b). But where they have no jurisdiction, no action will lie (c). Actions may be brought against the officer, as well as against the plaintiff (d). If a man bring an action in an inferior court, as in THE STAR-CHAMBER, an action will lie: and so where a man sues *coram non judice* (e), it not being in the ordinary way of justice. No action of escape will lie in this case (f).

S. C. Salk. 201.
S. C. Holt, 186.
1. Saund. 98.

MR. WHITACRE, *contra*. It being a matter transitory, and the Court having *prima facie* a jurisdiction, no one shall take advantage of it but the defendant (g). And it shall be at his election to avoid it by plea or not; and the defendant in this case is a wrongdoer, and so shall not take advantage of his own wrong. He said he was informed, that in the city of London they never say the cause of action * arose within the jurisdiction, as they must in all other inferior jurisdictions. A sheriff cannot take advantage of any erroneous proceedings, if he suffers an escape.

* [51]

HOLT, *Chief Justice*. Three things are to be considered as to the limitations of inferior jurisdiction, viz. persons, time, and place. As to persons and place; as in the *Case of the Marshalsea* (h), and

(a) Nichols v. Walker, Cro. Car. 394.
Papillon v. Buckner, Hard, 480.

(b) Adney v. Vernon, 3. Lev. 243.
Dye v. Olive, March, 117.

(c) Mico v. Morris, 3. Lev. 234.
Richardson v. Barnard, 1. Roll. Abr. 809.

(d) Hob. 267. Cro. Eliz. 836.
4 Co. 14. Cro. Jac. 3. T. Jones, 214.
1. Vent. 86. 2. Mod. 30. 195.

(e) Turner v. Felgate, 1. Lev. 95.

(f) See 1. Roll Abr. 547. March, 8.
2. Bulst. 64. and the case of Squib v.
Hole, 2. Mod. 29. S. C. 1. Freem. 193.

(g) Year-Book 26. Edw. 3. pl. 16.
2. Inst. 230. Rinch's Case, Raym. 189.
Neudick v. Stuit, 3. Keb. 852. Weaver v. Clifford, Yelv. 42. S. C. Cro. Jac. 3. S. C. 2. Bulst. 62.

(h)

Easter Term, 4. Queen Anne, In B. R.

LUTTIN
against
BENIN.

those of the household; for in that court they have jurisdiction only in *debt, trespass, and covenant*, and therefore should they hold plea of an *action on the case*, it is plain they have no jurisdiction. And as to things, he said, the city have jurisdiction in all causes, and are only restrained to place; and therefore the defendant ought to have pleaded to the jurisdiction. For if he admits of the jurisdiction, he is for ever after estopped (*a*). And an issue may be taken upon it; and if it be found to arise within the jurisdiction, judgment final ought to be given. If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged; for no lawful thing, founded upon a wrongful act, can be supported (*b*). If a justice of peace make an order for a man to keep a bastard-child, which in reality was born two days after marriage, all the officers acting under that order are wrong, and they are liable; because a justice can have no jurisdiction of the thing. But in this case the Court had jurisdiction of the thing, and therefore it ought to have been avoided by plea.

POWELL, *Justice*, was of the same opinion, and said, where an inferior court had jurisdiction in a transitory action, the defendant ought to plead it, otherwise *non constat* but it did arise within the jurisdiction; and to make it *coram non judice*, it must appear that the Court have no jurisdiction.

POWYS and GOULD, *Justices*, of the same opinion.

So judgment was, that the officer was liable to the action (*c*); *nisi* the defendant shews cause within a week.

(*a*) Gelder *v.* Pratt, cited 1. Ld. Ray. 230.

(*b*) 8. Mod.

(*c*) See Pool *v.* Gwin, Lut. 1560.
Squib *v.* Hole, 2. Mod. 29. Truscot
v. Sloper, 1. Ld. Ray. 230. Moravia

v. Sloper, Comy. Rep. 574. Higginson
v. Sheif, Comy. Rep. 150. Rowland
v. Veale, Cowp. 20. Trevor *v.* Wall,
1. Term Rep. 151. Cooper *v.* Boot,
1. Term Rep. 535.

Case 70.

Anonymous.

Bond dated at
B. is local.

* [52]

THE dating of a bond to be at a certain place, makes it local; and should the city of *London* hold plea, if it were dated at *York*, it would be erroneous: but the making * of a bond without dating, makes it transitory, and may be said to be made all over *England*.

Case 71.

Cockcroft against Smith.

The Court will not grant a new trial in battery, on account of the absence of one witness, if the party could have had another to the same fact.—S. C. ante, 43. 2. Salk. 645. 653. 6. Mod. 22.

MOTION FOR A NEW TRIAL. The case was in a battery: it appeared, that the plaintiff had a material witness that he knew to be sick, and yet went on with the trial; whereas he should have paid costs, and put off the trial.

HOLT:

Easter Term, 4. Queen Anne, In B. R.

HOLT, *Chief Justice*, doubted if the Court could grant a new trial. Cockcroft
against
Smith.

POWELL, *Justice*, said, it being in the case of a battery, which might affect a man all his life (a), he was inclinable to grant a new trial.

But it appearing that he might have had another witness to the same purpose, they were unwilling to grant one (b).

Adjourned.

(a) See S. C. ante, 43.

(b) The Court will, under special circumstances, grant a new trial on account of the unavoidable absence of a material witness, *Coppin's Case*, cited 2. Salk. 645. *Warren v. Fuzz*, 6. Mod. 22.; but not for the default or omission of the parties, their counsel or attorneys, in not coming prepared with, or going into evidence

which they were apprised of, and might have produced at the former trial. *Ford v. Tilly*, 2. Salk. 653. Anonymous, 6. Mod. 22. *Price v. Brown*, 1. Stra. 691. *Cooke v. Berry*, 1. Wilk. 98. *Spong v. Hogg*, 2. Black. Rep. 802. *Gift v. Mason*, 1. Term Rep. 84. *Vernon v. Hankey*, 2. Term Rep. 113.

Anonymous.

Case 72.

UPON the statute 15. Rich. 2. c. 2. of Forcible Detainer, where the justice finds it upon his own view, he must immediately commit, and cannot adjourn the commitment; but it must be done *eo instante* (a); as in the case of auditors on account, so if he has recorded the force.

But HOLT, *Chief Justice*, said, so long as the matter is under examination, he may adjourn.

(a) See *Rex v. Elwell*, 2. Stra. 794. 1. Salk. 353. 2. Hawk. P. C. 7th edit. S. C. *ld.* Ray. 1515. *Rex v. Leighton*, ch. 64. page 31. sect. 8.

Anonymous.

Case 73.

WHEN A PERSON comes to this court upon a *habeas corpus*, and the Court thinks fit to turn him over to THE MARSHAL, they commit him for no other matter than for the cause or causes returned on the *habeas corpus*. *Habeas corpus.*
Commitment.

Anonymous.

Case 74.

HOLT, *Chief Justice*, said, a justice that had power to set a fine, has power to bail; for he is not obliged and bound to commit him; but after he is once committed in execution, it is too late to move for bail. Justices of peace.
Ante, 45.

Anonymous.

Easter Term, 4. Queen Anne, In B. R.

Case 75.

Anonymous.

The Court will not change the venue in an action on a bill of exchange.

QUERE,—If the rules for changing of venue's extend to bills of exchange.

THE COURT doubted; but seemed to be of opinion that they did not, for the inconvenience that might ensue (a).

(a) The Court will not change the venue in an action on a promissory note or bill of exchange. See *Holcroft v. Colwest*, Andr. 66. *Kirk v. Broad*, Sayer, 7. *Downes v. Brial*, Black. Rep. 993.

1. Will. 41. *Pinkney v. Collins*, 1. Term Rep. 571. *Precious v. Bennet*, Tidd's Praet. 358. unless some special grounds be laid, *Foster v. Taylor*, 1. Term Rep. 781.

* [53]

Case 76.

* Anonymous.

Judges of B. R. or C. B. may, by the common law, take recognizances.

HOLT, Chief Justice, said, that by the common law, without the help of any statute, any Judge, either of this court or the common pleas, may take a recognizance for any sum on condition; for if a man will voluntarily enter into it, a Judge has power to take it.

Case 77.

Anonymous.

Difference of freeholders and copyholders.

BY HOLT, Chief Justice. Where a custom is, that all lands held of that manor (a) shall pass by surrender and admittance; yet the lands may be freehold; and the manner of conveyance is customary, inasmuch as livery is not requisite. And he said, the freeholds themselves can never be parcel of the manor, but it is the services (b). *Quare*.

(a) For the nature of freehold lands, and lands held by copy of court-roll, see 4 Rep. 31. 5. Rep. 84 or 34. that "ad voluntatem domini" is the distinguishing mark of a copyhold. 2. Lut. 1165. 1171. 3. Bulst. 230. 2. Vent. 143. Cro.

Eliz. 185. And as to setting forth a custom, *Rastal's Ent.* 62. 2. Brownlow's Decla. 96. Cro. Car. 418.—NOTE in former edition.

(b) 2. Roll. Abr. 120. Cro. Eliz. 39. 150.

Case 78.

Anonymous.

Title of common.

A MAN that claims common in another man's land, must set forth a title (a); but a man that is in possession need not set out a title (b).

(a) *Vernon v. Goodrich*, 1. Stra. 5. *Jones v. Hammond*, 2. Ld. Ray. 751. *Stroud v. Birt*, 4. Mod. 424. *Silly v. Dally*, 1. Ld. Ray. 331. *Johns v. Whetley*, 3. Will. 65. *Grimstead v. Marlow*, 4. Term Rep. 717.

(b) *Harrington v. Birch*, post. 219.

Langford v. Webber, 3. Mod. 132. *St. John v. Moody*, 1. Vent. 275. *Blockley v. Slater*, 3. Lev. 266. *Kentish v. Taylor*, 1. Will. 326. *Waring v. Giffith*, 1. Burr. 443. *Rider v. Smith*, 3. Term Rep. 766.

The

ON AN INFORMATION in the county of *Sussex*, several persons were convicted for killing, and being aiding and assisting to killing deer, and a warrant was made to levy the penalty by a distress; which warrant by a clause in it was to be returned. The warrant was delivered to the defendant, who levied the money, but made no return of the warrant; for which offence the defendant was indicted, and the indictment was removed here by *certiorari*.

SIR JAMES MOUNTAGUE *for the defendant* said, that the not returning the warrant is not an offence criminal to be indicted upon; and finding the money to be levied, makes for the defendant. He excepted, that there ought to have been a time and place when and where he should have returned this warrant to them, for he is not bound to travel over * *England* to find them. Again, his warrant is his justification and indemnity, in case he should be sued for a trespass.

MR. SERJEANT BRODERICK *contra*. By the very frame and design of the act of parliament, it is the duty of the constable to make a return of his warrant. He said, how could the justices know how to distribute the poor's part, unless it is returned to the justices what money is levied. The constable is in this case made a public officer, and it is a misbehaviour of him. In answer to the objection of travelling over *England* to find them, he said, justices are always supposed resident within their own counties.

But by HOLT, *Chief Justice*, There is a difference between returning the warrant itself, and returning what he has done. The not fixing a time when, and place where, is no fault; for he should have done it forthwith, and any-where within the county suffices.

POWELL, *Justice*. The return is necessary; because he may levy only part, and then further process should go out: for if the whole cannot be levied, then the justices must go upon another part of the act.

And PER TOTAM CURIAM, It is an offence indictable, for not returning what he has done.

HOLT, *Chief Justice*, said, if a man is under three convictions, and his goods are sufficient to answer two of them, the money shall be paid, and he shall stand in the pillory for the third: but on one conviction, if he want but two shillings in the whole, the justices cannot take it, but he must be imprisoned, and stand in the pillory for it afterwards.

AYRES. That the conviction was naught; for that it was not set forth, that the examination and oath were within the jurisdiction of the justices. He objected, that he was indicted for not returning the very warrant itself; which, he said, he ought to keep for his own indemnity.

MR.

A constable may be indicted for unlawfully, "obstinately, and contemptuously neglecting and refusing" to make a return of what he has done under a warrant of distress, directed to him, on a conviction on a penal statute.

* [54]

S. C. 2. *Ld. Ray.* 1189.

S. C. 1. *Salk.* 380.

S. C. *Fort.* 127.

Easter Term, 4. Queen Anne, In B. R.

THE QUEEN
against
WIAI.

MR. ATTORNEY, as to the objection, said, that it was in the indictment that he was *debito modo* convicted.

Judgment was stayed till the first day of next Term for the resolution of the Court, when judgment was given against the defendant;

HOLT, *Chief Justice*, differing: not but that he said it was an offence. But he said, in all process there ought to be a place, and a time, for the return.

* [55]

Case 80.

* Anonymous.

Contra pacem. "CONTRA PACEM" in an indictment for a nonfeasance is not necessary.

Case 81.

The Queen against Bass.

An indictment for a conspiracy in charging one with being father of a child is good, without averring that the child was in fact a bastard.

INDICTMENT FOR A CONSPIRACY, intending to scandalize a person, and to get money out of him, by alledging him to be the father of a child which such a woman was big with; but the indictment does not say it was a bastard-child.

WELD, *Serjeant*. A conspiracy to do an ill thing, where nothing is done to put it in execution (*a*), stands singly upon the intention, and is not an ill or criminal thing; it does not appear in the indictment, that the matter of slander is false, and therefore it must be intended true. In an indictment of this nature, or in case of perjury, "*falsè et malitiosè, &c.*" do not make the charge to be false; but these words, *ubi revera* it is not true (*b*).

HOLT, *Chief Justice*, said, *Long's Case* was very nice, and by his consent they should not be so nice again; and he questioned, whether any one case in the law was like it.

WELD, *Serjeant*, said, *Vaux's Case* (*c*) was something like it.

HOLT, *Chief Justice*, said, if two or three persons meet together, and discourse and conspire how to accuse another falsely of an offence, it is of itself an *overt act*, and is an offence indictable (*d*). So if two or three meet together (*e*) to conspire the death of the queen, yet though there was nothing but words passed, the very assembling together was an *overt act* (*f*).

(a) *Rex v. Veale*, 2. Keb. 39.

(b) *Long's Case*, 5. Co. 120.

(c) 4. Co. 44.

(d) *Poulterer's Case*, 9. Co. 59. Moor, 813. *Reg. v. Best*, 6. Mod. 138. *Rex v. Armstrong and Others*, 1. Vent. 304. *Timberly v. Child*, 1. Sid. 68. *Rex v. Spragge*, 2. Burr. 993. and 2. Hawk. P. C. 7th edit. ch. 72. f. 2. *Rex v. Kinnerley and Moor*, 1. Stra. 193.

(e) It is not necessary that the fact of their meeting should be proved, but it may be inferred by the jury from the circumstances of the case, *Rex v. Cope*, 1. Stra. 144. *Rex v. Parsons*, 1. Black. Rep. 392. *Rex v. The King's Bench Prisoners*, 2. Hawk. P. C. 7th edit. page 122. *notis*.

(f) *Foster's Crown Law*, 195.

Easter Term, 4. Queen Anne, In B. R.

The exception THE COURT went upon was, that it did not sufficiently appear that the charge was criminal, it not appearing the child was a bastard. Yet THE COURT said, this exception, viz. the not laying it to be a bastard-child in the indictment, was *primæ impressionis*.

POWELL, *Justice*, said, if people meet together to consult or conspire, to make it criminal they ought to come to some resolution; then he thought, if it appeared that he repented it might alter the case.

THE COURT took time to consider of * precedents, and see whether any went upon the omission of "bastard" in the indictment (a). * [56]

(a) Reg. v. Best and Others, 6. Mod. 321. Rex v. Rispal, 1. Black. Rep. 185. S. C. 1. Salk. 174. S. C. 2. Ld. 368. S. C. 3. Burr. 1320. Ray. 1167. Rex v. Edwards, 8. Mod.

Goddard against Smith.

Case 82.

ACTION ON THE CASE. The declaration stated, that *Richard Smith* and *Christopher Preston* conspired between themselves falsely and maliciously to cause *Richard Goddard* to be indicted as a barrator, without any cause or colour of such crime being committed by him; that they falsely and maliciously caused the same to be done; and that he the said *Richard Goddard* was according to law in a due and lawful manner thereof discharged. To prove this, the plaintiff produced at the trial a *nolle prosequi* by the attorney-general; and, Whether this were sufficient evidence to maintain the declaration? was the question for the opinion of the Court.

HOLT, *Chief Justice*, seemed to disallow of *nonproffes* and *cessat processus*; for the proper way would be to plead not guilty, and THE ATTORNEY-GENERAL to come in and confess it (a).

MR. HARCOURT, *Master of the Crown Office*, said, the first *nonproffes* was in the sixteenth year of *Charles the Second*.

It was a doubt, whether an action of conspiracy would lie upon such an acquittal; for the declaration must be, that he was *debito modo acquietatus*.

DARNEL, *Serjeant*, said, Suppose a man declare he was prosecuted, *quousque* there was an entry of a *nonproffes*, would that have been good?

To which THE COURT gave no direct answer, but seemed to incline that it would not; for the *nonproffes* is not a discharge of the crime, but only of the indictment (b): and they went upon MR. HARCOURT's report, that they used to indict them again, and not to proceed upon the same indictment (c).

(a) Reg. v. Oglethorpe, post. 115.

(b) 4. Com. Dig. "Indictment" (K). "Justices" (W).

(c) THE COURT held, that the evidence did not maintain the declaration, because a *nolle prosequi* does not, as an

acquittal does, discharge the crime, but only puts the defendant without day; but they held, that if *Goddard* had pleaded not guilty, and the attorney-general had confessed the plea, that would have maintained the declaration. S. C. 6. Mod. 262.

The

THE QUEEN
against
BARR.

An action for a malicious prosecution, stating, that the plaintiff was thereof lawfully discharged, is not maintained by shewing a *nolle prosequi* entered on the indictment.

S. C. 6. Mod. 261.
S. C. 1. Salk. 21.
S. C. 3. Salk. 245.
S. C. Holt, 497. Post. 115.
2. Salk. 456.
Ld. Ray. 721.
1. Bl. Rep. 785.
1. Bac. Abr. 62.

Easter Term, 4. Queen Anne, In B. R.

Case 83.

The Queen *against* The Inhabitants of Stratford.

An indictment for not repairing a highway, stating, that it was "so narrow, "dirty, and "clayey, that "people could "not pass," is insufficient.

ERROR TO REVERSE A JUDGMENT given in an indictment for not repairing a highway.

MR. RAYMOND excepted, that it was not said the way was out of repair; but that it was "*tam angusta, fœda, et lutoſa*, as to "hinder the queen's subjects passing." Now it did not appear but that it was antiently so, and that it was not narrower than before; but it was not shewn that the way was straitened and the passengers delayed.

For which THE COURT thought it was insufficient, but put off judgment until next Term, upon the prayer of NORTCLIFF, that he might inspect the record.

Judgment to reverse it, *nisi causa* by the last day of Trinity Term.

* [57]

Case 84.

* Idle *against* Cook.

A surrender of a copyhold "to "the use of the "surrenderor "for life, and "after his decease to the "use of A. and "his wife, their "heirs and assigns for life; "and for default of such issue, to the "use of the "right heirs of "the surrenderor for ever;" conveys an estate in fee to the husband and wife; but by such a devise they would have only taken an estate-tail.

A SURRENDER was made of a copyhold estate for life, the remainder to a man and his wife for life, and their heirs and assigns; and for default of such issue, the remainder over.

The question was, What estate the man and his wife have, there not being the words "of their bodies?"

GOULD, *Justice*, held it an estate-tail; and he said, he made a difference between a copyhold and freehold estate, *quoad* this; he compared this case to *Beresford's Case* (a) and *Peck's Case* (b). He said, "such issue" qualified the general words (c). He took a difference between a grant to a man and his heirs, and the heirs of him (d).

POWYS, *Justice*, held it a fee-simple. To make an estate-tail, it must appear from what body the issue must come (e). But in the case of a devise it is otherwise, because of the intention (f). And being *inops consilii* (g), he said, in a conveyance, "*de corpore*" is an essential part; but there may be words tantamount (h). It being an estate to the husband and wife, and their heirs, the words, "and for default of such issue," are uncertain whether it is meant the issue of both or of the survivor. He made no difference between the limitation of a freehold and a copyhold, and cited the case of *Seagood v. Home* (i), and *Harrington v. Smith* (k). The will of the donor is to be observed in estates-tail, but then the will must be *manifestè expressa*. In conveyances, the limitations of estates have known words; and he said, it would be of dangerous consequence to allow a latitude.

POWELL, *Justice*, held it a fee-simple; for the words were "and to the heirs of the aforesaid baron and feme, and *pro defectu*

S. C. 2. Salk. 620.
S. C. Holt, 164.
S. C. 2. Ld. Ray.
1144.
S. C. 1. Peer.
Wms. 70.
2. Atk. 101.
1. Pr. Wms. 14.
2. Vezey, 257.

(a) 7. Co. 41.
(b) Litt. Rep.
(c) Litt. Rep. 347. Moor, 424.
(d) Plowd. 541. 1. Leon. 50.
(e) Litt. sect. 31.
(f) Hob. 32. Co. Lit. 27.
(g) 9. Hen. 6. pl. 25.

(h) 37. Affize, pl. 17. S. C. Co. Lit. 21. 5. Hen. 5. pl. 6. Fitz. Abr. 743. and Abraham v. Twig, Cro. Eliz. 473. Childs v. Westcott, Cro. Eliz. 470.
(i) Cro. Car. 366. S. C. W. Jones, 342.
(k) 2. Sid. 41.

" talis

"*talis exitus*." He was not for confounding estates-tail and fee; for though the intent of the parties might be to make an estate-tail, yet he would suffer a mischief rather than an inconvenience. He inquired if there was anything in this case to make it a fee-simple conditional * at common law, which the statute *De Donis* has now made a fee-tail; for this statute was made to prevent the abuses of the wills of donors, by letting a second husband or wife be dowerable, or tenant by curtesy. He could not see the difference that GOULD, Justice, took, between a gift to a man and his heirs and to the heirs of that man. He thought they had gone too far already in matters of intent, which made the law so uncertain; and in this case there was nothing but general words for the words "such issue" to refer to.

Inte
against
Cook.

* [58]

HOLT, Chief Justice, held, that this is a fee, and by no means can be construed a fee-tail. He owned the intention was to make it a tail, but he could by no rule of law do so, without a manifest violation of law. He said, surrenders must be construed as deeds. *Litt. sect. 31.* To make a tail, there must be a description of the body from whence the heirs must come. *Co. Lit. 27.* There is a great deal of difference between a man's expressing his intent in a will and in a conveyance; for in the last, the law has established certain legal words, and no other, though they are tantamount, will do; but in a will, he said, the statute 32. *Hen. 8. c. 1.* gives him power to convey away his lands at his will and pleasure; and he relied upon the words "will and pleasure." Had the subsequent words, "*pro defectu talis exitus*," been consistent with the first words, they would have qualified the general words. If a man give an estate to a bastard and his heirs, and if he die without issue the remainder over, this is void; for it is a limitation upon a fee to defeat and defraud the lord of his escheat. The case of *Abraham v. Twigg (a)*, he said, was a great authority in this case; and he said, he could not distinguish between them. *Co. Lit. fo. 20.* He said, a grant to a man and his heirs lawfully begotten would be a fee, but to a man and the heirs of him would be a tail. To construe this an estate-tail would be repugnant to the premises, because it is to them and their assigns; so that it is designed an assignable estate, which is contrary to an estate-tail, for that is restrained by the statute. *Hob. 170. Dyer, 264.* He said, as the intent of the * parties is to be considered, so the rules of law are to be observed (b).

* [59]

(a) Jones, 342.

(b) It was adjudged, that they took an estate in fee-simple, S. C. 2. *Ld. Ray. 1152.* But see *Rigden v. Vallier*,

2. *Vezey*, 252. 3. *Atk. 731.* Goodtitle *v. Stokes*, 1. *Will. 341.* *Fisher v. Wigg*, *Ld. Ray. 622.* 1. *Peer. Wms. 14.* *Sutton v. Stone*, 2. *Atk. 100.*

Easter Term, 4. Queen Anne, In B. R.

Cafe 85.

The Queen against West.

The sessions cannot commit a man for disobeying an order of filiation, but must proceed on his recognizance.

S. C. 6. Mod. 180. S. C. 2. Ld. Ray.

1157.

Post. 65. 136.

An order of filiation on the examination of one justice is bad, though the adjudication be by two justices.

1. Salk. 73. 5. Mod. 322. Burr. S. C. 137.

An order of maintenance for an excessive sum is bad.

A reputed father shall be bound over, although the order of bastardy be quashed.—2. Salk. 475.

THE DEFENDANT had an order made upon him by two justices for keeping a bastard-child; he appealed to the general quarter-sessions, who confirmed the order, and committed him for disobedience to their order.

He was brought here by *habeas corpus*.

MR. KING moved, that he might be discharged; for that the justices ought not to have committed him, but to have proceeded upon his recognizance.

THE COURT seemed to be of that opinion (a).

There was a fault in the first order, which was, “*Dr. Fuller* and another, two of her majesty’s justices of the peace, doth adjudge, &c.” *Cro. El.* 108. *Cro. Car.* 464.

BUT THE COURT thought this not sufficient to quash the order (b).

But they quashed it, for that it appeared the justices ordered him to pay an excessive sum.

AND NOTE, Though they quashed the order, they ordered him to appear the next sessions.

(a) See *Rex v. Hammond*, 2 Bulst. 341. *Reg. v. Simmons*, post. 136. (b) See *Billings v. Prin*, 2. Bl. Rep. 1018. *Rex v. Wykes*, 2. Stra. 1092. *Rex v. Forrest*, 3. Term Rep. 48. *Rex v. Hamstall Ridgware*, 3 Term Rep. 380. *Rex v. Stotfold*, 4. Term Rep. 596.

Cafe 86.

Colonel Layton’s Cafe.

One in execution for a fine not bailable.

S. C. ante, 46.

S. C. post. 236.

COLONEL LAYTON being brought up by *habeas corpus*,

HOLT, *Chief Justice*, ordered precedents to be searched, whether a person in execution for a fine can be bailed, having brought a writ of error and assigned error. See *Cro. Car.* 557. 1. Sid. 320. 296. or 286. 1. Keb. 88.

After precedents searched,

HOLT, *Chief Justice*, said, he found the cases not put fair in case of execution; and said, bail in execution was always refused.

And of this opinion were THE WHOLE COURT now, and remanded him (a).

(a) See 2. Keb. 173. a difference between bail to reverse an outlawry and to reverse a judgment; because in the first case he is liable; for that is in order to

bring the cause to a trial; and the latter is to defeat the whole record.—NOTE in former edition.

Startup

A PROHIBITION was moved for to a suit in the ecclesiastical court for tithes, upon this suggestion, *quod à tempore cujus, &c. habebatur talis antiquus usus et consuetudo de modo decimandi de et pro omnibus decimis quibuscunque infra parochiam de W. et fines, limites, et loca decimabilia ejusdem quoquo modo crescentibus, renovantibus, sive contingentibus, viz. quod omnes et singuli proprietarii, eorum firmarii, vel occupatores aliquarum terrarum vel tenementorum infra parochiam de W. prædictam, &c. per totum tempus prædictum annuatim solverunt, et solvere consueverunt, rectori ecclesiæ parochialis de W. prædicto firmario sive deputato rectoriæ illius pro tempore existenti upon request secundum ratum 2s. legalis monetæ Angliæ pro quâlibet et utrâque librâ veri adaucti annualis redditus vel valoris, ANGLICE of the true improved yearly rent or value, respectivorum terrarum et tenementorum infra parochiam de Whatlington prædictam, &c. et non ultra, in nomine, loco, ac in plenâ satisfactione, omnium et singularum decimarum quarumcunque annuatim crescentium, &c. in vel super respectiva terras et tenementa sua infra parochiam de W. prædictam, &c. which the several rectors, &c. have, time out of mind, accepted in full satisfaction, &c. of all tithes, and the custom aforesaid inviolably observed; yet the defendant, knowing the premises, has sued the plaintiff in the court-christian for subtraction and non-payment of tithes of hay and wheat in and upon the lands and tenements aforesaid, in the tenure and occupation of the plaintiff, being in the year of Our Lord 1696, growing, &c. and supposed by him to be subtracted and taken away, licet the plaintiff, &c.*

And a rule was made for the defendant to shew cause, why a prohibition should not be granted.

MR. PENGELLY cited the following cases to shew, that where a *modus* is uncertain, or exposes the parson to be defrauded, it is a void *modus*: *Perry v. Saame (a)*, *Allen's Case (b)*, *Took v. Ledgard (c)*, *Wilson v. The Bishop of Carlisle (d)*, *Farmer v. Lawrence (e)*, and *Page's Case (f)*.

BRODERICK, *contra*, cited, the *Case of Tenures (g)*, *Titus v. Perkins (h)*, a case in *Leonard (i)*, and the *Fourth Institute (k)*.

HOLT, *Chief Justice*, said, that whatever may be good by agreement may be good by custom; and as custom may diminish tithes, so it may increase them. So, by custom, lead in *Derbyshire* pays tithe. Whenever a *modus* runs high, it is a strong presumption that it is no *modus*.

THE COURT refused a prohibition; because it appeared that the *modus* (as it was pretended to be) was of nigh the full value (*l*).

(a) Cro. Eliz. 139.

(b) 2. Roll. 264.

(c) 1. Keb. 612.

(d) Hob. 107.

(e) Stiles, 397.

(f) Cro. Jac. 671.

(g) 11. Co. 15.

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(h) 3. Mod. 132.

(i) 2. Leon. 107. 117.

(k) 4. Inst. 91. 96.

(l) See the case of *Bine v. Dodderidge*, 1. Ld. Raym. 696. and 2. Bl. Com. 30, 1. Bl. Rep. 420. 2. Bl. Rep. 1257.

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TRINITY TERM,

The Fourth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

Anonymous.

Case 88.

MR. SERJEANT DARNELL moved in arrest of judgment in an action for words. The words were, "You have forgot since you lived in the *Black-Bull-Yard*! You are a rascal and a villain; there you could procure broad money, and could clip it when you had done, and there the sheers could go." He insisted upon it, that * here was nothing in these words alledged but only a power of doing, but no positive charge. Words may be actionable, though they contain no direct and positive assertion.

* [61]

POWELL, *Justice*, said, taking the words all together they would bear a strong intendment that the fact was done.

HOLT, *Chief Justice*, put this case: Suppose a man is dead, and A. says, "*John of Styles* could have murdered him;" *Quære*, If this would be actionable.

THE COURT took two or three days to consider of it: but afterwards the plaintiff had his judgment.

Case 89.

Page against Hayward.

Tenant in tail and remainder-man join in making a tenant to the *præcipe*, who vouches them jointly, and they vouch over the common vouchee.

NICHOLAS SEARLE devised his estate to his niece *Mary Bryant*, and the heirs male of her body, upon condition and provided, that she intermarry with, and have issue male by, one furnished *Searle*; and in default of both of the said conditions, he devised to *Elizabeth Bryant* in the same manner; and in default thereof, he devised to *George Searle* for sixty years, if he so long live; remainder to the heirs male of the body of the said *George*, and their issue male for ever.

S. C. 2. Salk. 570.
S. C. 2. Eq. Ab. 362.
S. C. 3. Salk. 96. 135.
S. C. Holt, 618.
S. C. Pigot on Rec. 176, 177.
2. Roll. 194.
Stiles, 315.
Cro. Jac. 318.
3. Cro. 21.

Mary, and *Elizabeth* and her husband, for she had then married one *Cliff*, joined in a fine to make a tenant to the *præcipe*, who was one *Isaac Saverey*. *Isaac Saverey* vouched *Mary Bryant*, *Elizabeth Cliff* and her husband, and the wife of the testator with her husband, she being again married, and vouched them all jointly; and they vouched over the common vouchee.

Two general questions were :

FIRST, Concerning the estate the sisters take.

SECONDLY, Whether the recovery suffered is sufficient to dock the tail.

And resolved PER CURIAM,

FIRST, That *Mary* takes an estate-tail in possession, and the other an estate-tail in remainder (a). See Co. Lit. 26. b. 17. Edw. 2. 23.

HOLT, Chief Justice, also said, the statute *De Donis* is not to be taken strictly, but all limitations within the meaning of the statute ought to be supported : " Words of an *express condition* shall not ordinarily be construed as a limitation; but where an estate is to remain over for breach of a condition, which is by express words of a condition, yet it ought to be intended as a limitation." Suppose a *præcipe* is brought against tenant in tail and a stranger, is this a flaw? Surely no : such a recovery I hold good.

(a) It was adjudged by the whole Court : FIRST, That the estate devised to *Mary* was a good estate in special tail; that is, to her and the heirs male of her body begotten by a *Searle*.—SECONDLY, That the words "upon condition, &c." though express words of condition, should be taken to be words of limitation.—THIRDLY, That the estate-tail of *Mary* did not cease by marrying a person whose name was not *Searle*, because she might possibly survive her first husband, and afterwards marry a person of the name of *Searle*.—FOURTHLY, That if the estate had been devised to *Mary* and the heirs male of her body, by a *Searle* to be begot-

ten, provided and upon condition, that if she married any other person but a *Searle* the estate should go over, a common recovery suffered before marriage would bar the estate-tail and remainders; and THE COURT took a difference between a collateral condition and a condition which runs with the land; for if a donor receive a rent with a condition to re-enter, a recovery will not bar it; *aliter* if the condition be to re-enter for non-payment of a sum in gross. Cruise on Recoveries, 282; 283.—See also *Gulliver v. Ashby*, 4. Burr. 1929. *Fearne*, 314. *Driver v. Edgar*, Cowp. 379.

SECONDLY,

Trinity Term, 4. Queen Anne, In B. R.

SECONDLY, I hold tenant in tail may well make a tenant to the præcipe (a).

PAGE
against
HAYWARD.

Judgment was given that the recovery barred the estate-tail (b).

(a) See this case reported very fully,
Pigot on Recov. 177.—See also Leech v.
Cole, Cro. Eliz. 670.

(b) Cruise on Recov. 238.

* [62]

The Queen against Johnson.

Case 90.

MR. SERJEANT BRODERICK moved to quash an indictment, which set forth, that a justice had committed a woman to prison, "*there to be kept till further examination*;" and that because the officer did not carry her to prison, but kept her in his own house (though he brought her forth upon demand), he was indicted, as disobeying the justice's order, and behaving himself negligently, &c. The commitment was on *Saturday*, and he brought her forth before the justices on *Monday*.

If a justice commit a person for further examination, the officer is indictable for not carrying him to prison, although he produce the prisoner on the day of the next examination.

S. C. Trem. 119.

PER CURIAM. He ought to have carried her to prison forthwith: whereupon THE COURT refused to quash it.

It appeared also, that during the time he took a note from her for ten shillings; which THE COURT held a great misdemeanor (a).

It is a misdemeanor in an officer to take anything from a prisoner in his custody.

(a) See Reg. v. Belwood, post. 79.

The Bishop of Cloyne against Gibbons.

Case 91.

Error out of IRELAND.

DR. LANE. If a chancellor of a diocese commit an irregularity in his office, the bishop cannot call him to an account in his own court, but ought to carry it before the archbishop. A vicar-general is created by a bishop, but his office is by the law; and he may exercise such a jurisdiction as belongs to his office; which is a general jurisdiction, and the bishop cannot hear causes himself, neither matrimonial nor other, but it must be done by his proper officer; and if he refuse or neglect to make an officer, the law has taken care to provide that the archbishop, and then the queen, shall. Every presentation ought to be under THE SEAL of the consistory court; for he said, he knew no other seal, neither had the bishop any other court but the consistory court. Bishops may delegate all external jurisdictions but consecration of churches, or confirmation, &c. which are annexed to the person of the bishop. There is no difference between a vicar-general and a chancellor. *Linwood* (a) describes what the vicar-general may do. A vicar-general cannot dispose of any livings in the gift of the bishop, because it is annexed to the bishop as his personal property (b). Institution and induction is an act of the law; and though by his granting the vicar-

Error from Ireland.

Of vicars-general. If the chancellor of a diocese is faulty, the archbishop has cognizance of it, not the bishop. *Quære.*

S. C. Holt, 602.

Institution and induction.

(a) *Linwood*. lib. 2. tit. 4. pa. 194.

(b) *Li. 3. Decr. ti. 6.*

Trinity Term, 4. Queen Anne, In B. R.

THE BISHOP
OF CLOYNE
against
GIBBONS.

* [63]

general institution and induction he was not concluded himself, yet his vicar has a concurring jurisdiction. He compared the excepting institution and induction in the general grant to the chancellor to a lord of a manor's granting a patent to his steward, reserving that his steward should not take a surrender, nor make an admittance: this he said was a nullity; for when the bishop or lord has made him an officer, the law gives him his power. *Reservatis nobis* such a jurisdiction of itself does not exclude the chancellor, but only leaves a power to the bishop which otherwise he would have lost; and so they have a concurring jurisdiction.

DR. FLOYD. A vicar-general is a temporal officer, and the bishop might have turned him out at pleasure; but by the confirmation of the dean and chapter, and by the temporal law, he has a freehold; but the intent of the law was not to give away all the authority from the bishop, but the chancellor was only to assist and help the bishop. He said, the law would not take notice of a certificate upon a *capias excommunicato* from a chancellor; for in the eye of the law, the bishop is the ordinary. There is a difference between *judices ordinarii* and *judices delegati* in the civil law. Granting of licences to schoolmasters belongs to the bishop, and no chancellor ever pretended to this. He said, that by a general grant of a chancellorship, the power of institution, induction, &c. does not pass without special words; and so many other things which are inherent in a bishop. But if institution belongs to the office of a vicar-general, then such a revocation is void and repugnant; which the Court seemed to agree in. The Court ordered search how their antient patents run, and if there were antiently any revocations.

HOLT, *Chief Justice*, said, he thought the bishop might sit in court, for he is a Judge; but he cannot deprive his chancellor of his temporal fees. If before the statute of *Henry the Eighth*, which enables laymen to be chancellors, institution *de jure* belonged to the chancellors; then reserving this now is void: but if it requires special words to pass it, then it may be reserved.

But it being a matter of great moment, the Court ordered it to be argued again next Term.

In *Trinity Term*, in the fifth year of *Queen Anne*, the Judges were unanimously of opinion, that the judgment given in *Ireland* for a consultation should be reversed.

HOLT, *Chief Justice*, said, the bishop could not cite *Gibbons* for taking the money due on the parishioners at the time of the sequestration; for the bishop had the same remedies for the ecclesiastical duties which the incumbent should have had, and that is against the parishioners, who possibly paid these duties in their own wrong. If the ordinary appoint a sequestrator, and any person disturbs him, trespass lies. This is a good induction *de facto*, and such incumbent shall not be drawn into the spiritual court by reason of the institution.

POWELL,

Trinity Term, 4. Queen Anne, In B. R.

POWELL, *Justice*. The institution shall not be controverted after induction in the spiritual courts ; so their foundation here of the bishop is wrong, and he shews him as if the sequestration was still in being, and takes no notice of the institution nor induction ; and it is for retaining the dues which should belong to the sequestrator, which is ill, for the sequestrator should complain. In fine, the trial of induction belongs to the temporal courts.

THE BISHOP
OF CLOYNE
against
GIBBONS.

POWYS, *Justice*. They would bring the trial of induction *ad aliud examen* : The *parishioners* should be sued for the dues, and not Gibbons ; but the bishop takes the parson for the wrong-doer.

GOULD, *Justice*, accordingly ; for after induction, the spiritual court cannot try it ; for that is in truth only to try whether the induction be good, which is cognizable at law.

The judgment was reversed.

Anonymous.

MR. EYRES moved to quash an indictment against a woman for using the trade of a millener, not having * served an apprenticeship.

But THE COURT refused to quash it.

HOLT, *Chief Justice*, said, it ought to be tried whether it was within the statute 5. *Eliz.* c. 4. or not ; for it did not appear to the Court but that it might be a trade at the time of making the statute ; and all trades are not enumerated in the statute, but yet they may be within the meaning.

* [64]
Case 92.

Quere, Whether a millener is a trade within the restraints of
5. *Eliz.* c. 4.
1. Roll. Rep. 10.
1. Vent. 326.
346.
2. Lev. 206.
Cro. Car. 499.
2. Bullst. 191.
Salk. 611.
2. Hawk. P. C. ch. 19.

Anonymous.

THE CASE was in an assault. It appeared, that the defendant came *manu forti* to rescue a *distress* from the plaintiff ; and that the plaintiff had not time to request him to forbear ; therefore,

PER CURIAM, The assault was well justified (a).

(a) But it must be pleaded, Bull. N. P. 282. Gibbon v. Pepper, Salk. 677. 17. ; for a justification cannot be given in evidence on the general issue, Co. Lit. Barfoot v. Reynolds, 2. Stra. 953.

Case 93.
An attempt to rescue will justify an assault.
2. Roll. Abr. 549.

MICHAELMAS TERM,

The Fourth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

General Rule.

Case 94.

A RULE was made, that where a *mandamus* went above forty miles, the return should be at least fifteen days; and where under forty miles, eight days at least (a). Return of a *mandamus*.

(a) There is no such rule of court in the Collection of Rules and Orders *E. R.* printed in 1795.

Anonymous.

Case 95.

WHEN A JURY bring in a verdict, and there is surplufage, the Court will reject the surplufage. Surplufage in a verdict rejected.

3. *Leo.* 80. 7. *Hen.* 6. 20. 1. *Leo.* 323.

The Queen against Whiting.

Case 96.

UPON A MOTION to quash an order of sessions upon a settlement, for that it was not in the order that they adjudged him to be *last settled* in such a parish he came from; An adjudication that a pauper was *last settled* in such a parish is good.

THE COURT held it not necessary so to adjudge it (a).

(a) See *Trowbridge v. Weston*, 2. *Salk.*

473. *Bury v. Arundel*, 2. *Salk.* 479.

Rex v. Hackney, 2. *Salk.* 478. *Reg.*

v. Middleham, Foley, 271. *Egburn v.*

Hartley Wintley, 1. *Seff. Cases*, 45.

Rex v. Westwood, 1. *Strange*, 73. *Rex*

v. Warnhill, 2. *Seff. Cases*, 91. *Bowling*

v. Bradford, *Burr. S. C.* 177. *Rex v.*

Normanton, *Burr. S. C.* 213.

But

An order for the removal of a certificated pauper must shew that he was actually chargeable.

But it not appearing in the order that * he had been chargeable to the parish, but only that, "WHEREAS he was likely to become chargeable;"

THE COURT quashed it; for by *the certificate* the parish is bound to receive him, and cannot remove him until he become chargeable actually (a).

(a) *Malden v. Fletwick*, 2. Salk. 530.

Cafe 97.

Swaine against Stevens.

Terre tenants to sever in pleading.

Bridge. 69.

1. Leon. 290.

Dyer, 321.

Hard 163.

Cro. Car. 295.

Cro. Jac. 392.

IN CASE of a *scire facias* against several *terre-tenants*, they cannot join in a plea, but ought to plead severally.

Quere, If after a plea in abatement a special nontenure may be pleaded.

For HOLT, *Chief Justice*, said, by pleading in abatement he had admitted himself tenant. See 8. *Edw. 4. pl. 19. b.* 2. *Brown*, 1. *Owen*, 134. 16. 1. *Inst.* 121. *Cro. El.* 122. 739, 740. 2. *Roll*, 144. 1. *Lev.* 190. 7. *Hen. 6. pl. 25. b.* 8. *Hen. 6. pl. 32. b.* 2. *Keb.* 46.

Cafe 98.

Bridge against The Parish of St. Mary-le-Bone.

Order of bastardy.

Ante, 59.

Post. 136.

6. Term Rep.

147.

ON certifying an order of justices upon the statute 4. *Eliz. c. 6.*

An exception was taken to the order, that the judgment ought to have been, that inasmuch as they had ordered him to pay the money, and he had refused to pay, then to commit him; but in this case it was, that they ordered him to pay so much, and in case he refused, then, &c.

HOLT, *Chief Justice*, said, the act directs in what manner the money shall be levied; that is, first an order or a judgment that he is in arrear; then if he make an actual refusal, an award of a distress; and if upon a return that he has nothing to be distrained by, then a commitment.

THE COURT confirmed that part of the order relating to his payment of the money, and quashed the order for the commitment; nisi in a week.

Cafe 99.

* Knight against Barker.

Trover lies for "pieces of ends of boards."

S. C. 2. *Ld. Ray.* 1219.

IN ARREST OF JUDGMENT, for that the declaration was in TROVER for "*quingentis peciis intestinarum*," ANGLICE "of ends of deal-boards."

SIR JAMES MOUNTAGUE. "Pieces" are of a very uncertain signification; for they might be middle-pieces, or side-pieces; and they

Michaelmas Term, 4. Queen Anne, In B. R.

they might be of very uncertain dimensions; and cited the case of *Lawrance v. Turnor* (a), where a declaration in trover "de tribus ponderibus lanae" was held uncertain; *Walter v. Farmer* (b), where "quinque carucar. ANGLICE cart-load," was held uncertain; *Powell v. Hopkins* (c), where judgment in trover "de ducentis ponderibus aris, et ducentis ponderibus plumbi, ANGLICE of brass and lead," was stayed; *Miller v. Green* (d), where trover for so many "parvis teniolis, ANGLICE ribbands," was held bad for uncertainty, by HALE, Chief Justice; *Ellis v. Tarnly* (e), where judgment in trover for "duobus pullis" was arrested.

KNIGHT
against
BARKER.

SERJEANT DARNELL *contra*. Trover will lie for "a study of" books (f); and the law does not require so precise a form in this action as it did in the infancy of it; if it is according to the common acceptance, it will be very well.

POWELL, Justice. All workmen call all those short pieces not being fit for wainscoting, flooring, &c. "ends;" and this being a particular term of art amongst the house and shop joiners, and generally understood by workmen, is a proper denomination for all short pieces (g). Had it been for "peciiis extremis" or "exterioribus" it had not been so well; for these words would not comprehend the middle part.

Adjudged good, *absente* HOLT, Chief Justice.

But afterwards the Court gave a farther day, when judgment was affirmed by HOLT, Chief Justice, &c.

- (a) Palm. 393. S. C. 2. Roll. Rep. 369. See also *Elphick v. Aston*, 2. Roll. Rep. 763. *Radley v. Rudge*, Stra. 738.
(b) Latch. 216. Bottomly v. Harrison, 2. Stra. 809.
(c) Stiles, 247. S. C. 2. Ld. Ray. 1529. *Hafelgrave v. Thompson*, Stra. 810.
(d) 3. Keb. 153. (g) 1. Bulst. 126. Cro. Jac. 129.
(e) 1. Keb. 124. 176. (f) *Mayo v. Flower*, 1. Sid. 98. — 5. Mod. 178.

The Queen against Gunn.

Case 100.

ARREST OF JUDGMENT in an indictment of perjury before the justices of peace in *Norfolk*; for that it set forth, that a fine was levied in the court of common pleas *Westminster*, in the county of *Middlesex*; and that the defendant perjured himself at *Theed*, in the county aforesaid.

An indictment for perjury, found at the sessions in *Norfolk*, stating, that an act was done at *Westminster*, in the county of *Middlesex*, AND that the defendant did commit perjury at *Theed*, in the county aforesaid, is bad.

MR. SERJEANT WELD held, that this must relate to the last county named; and then the justices of peace for *Norfolk* could not have jurisdiction; and this, he said, was the express case of *The Queen v. Rhodes*, adjudged about two years ago in this court.

SIR JAMES MOUNTAGUE *contra*, and said, if it had been in case of an action, it would * have been good. He took a difference

* [67]

Cro. Eliz. 658. 709. Cro. Jac. 549. 585. Yelv. 97. 3. Lev. 436. Cases C. L. 82. 103. Burr. 333. 1. Term Rep. 149.

between

Michaelmas Term, 4. Queen Anne, In B. R.

THE QUEEN between the counties being in the margin and in the body of the indictment, and where it is only by way of recital, and in the substantial part of the indictment.

against
GUNN.

SERJEANT WELD. If it can ever be construed bad, it shall never be taken otherwise in an indictment.

The opinion of **THE COURT** was, that the indictment was naught (a).

Sed adjournatur.

Indictment may Afterwards **WELD, Serjeant**, took another exception, that be found at *ses-* justices of the peace have no power, by their commission, to take sions for *perjury* indictments of *perjury* and *barratry*. and *barratry*.

4. Mod. 51.
379.

But **THE COURT** doubted, and seemed afterwards of opinion they might (b).

(a) See *Man's Case*, Latch. 194.
1. Roll. Rep. 21. 27. *Cholmley's Case*,
Cro. Car. 465. *Rex v. Solomons*,
1. Term Rep. 149. *Rex v. Mathews*,
5. Term Rep. 162. *Graham's Case*,
Cases Crown Law, 82. 4. Hawk. P. C.
ch. 24. f. 33.

(b) In *Rex v. Bainton*, an indictment at the quarter sessions for *perjury* at common law was quashed for want of jurisdiction; and it was said to have been done so about three years before in the case of *Rex v. Wellings*, 2. Stra. 1088.

S. P. Rex v. Yarrington, 1. Salk. 406.
Rex v. Beamont, Sayer, 278.; and see the reason why justices cannot try this offence under the commission of the peace; 3. Hawk. P. C. 7 edit. ch. 8. f. 64. But they may try it under commission of oyer and terminer; and it is said, that justices of peace, as such, have cognizance of *barratry* under the commission of the peace by virtue of 34. *Edw. 3. c. 1.* *Yelv. 46.* 2. Roll. 151. 2. Hawk. P. C. ch. 81. f. 8. 3. Hawk. P. C. 1. 8. f. 65. *Barnes v. Constantine*, Cro. Jac. 32.

Case 101.

Anonymous.

No nuisance to a fair, &c.

POWELL, Justice, said, there could not be a nuisance to a market or franchise, but to a highway, &c. *Quare.*

Case 102.

Serjeant T. Whitacre's Case.

Mandamus to restore a recorder. *Quare.*

S. C. 2. Ld. Ray.
1233. 1283.
S. C. Holt, 443.
S. C. 2. Salk.
434.

IN THE CASE of a *mandamus* to restore *Serjeant Whitacre* to the recordership of *Ipswich*, these cases were cited to shew, that a corporation by prescription may have several names by reputation; as if they are called by one name, though it is not exactly the right name, yet if it is sufficient to describe the persons they must answer the writ. 6. *Rep.* 65, 66. 21. *Hen.* 6. 4. 10. *Rep.* 125. b. 9. *Rep.* 48. 38. *Hen.* 6. 33. *Fitz. tit.* 3. 457. 1. *Cro.* 416. 418. 2. *Roll. Abr.* 136.

One reason for turning him out was, that he did not attend at their sessions after they were appointed. *Yelv.* 116.

A difference betwixt justices of the peace and of oyer and terminer and gaol delivery, *Stat.* 4. *Edw.* 3. 2. *Leo.* 117. 3. *Cro.* 90. *Cont. C. J. Jones*, 51. 9. *Co.* 50. 2. *Co.* 155. "Non utere" is a forfeiture, *Co. Lit.* 223. *Dyer*, 114.

WELD, Serjeant, cited these cases about misnomers, 3. *Cro.* 338. *Moor*, 233. 1. *Roll. Rep.* 118. 1. *Keb.* 623.

HILARY

HILARY TERM,

The Fourth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* [68]

* Anonymous.

Cafe 103.

HOLT, *Chief Justice*, said, a copyholder has only a possessory property in timber-trees, which if severed from the freehold by tempest, or otherwise, the property would be in the lord. A copyholder for life cannot cut timber-trees.

Ante 18.

1. Roll. Abr. 560. 3. Bulst. 81. Cro. Jac. 29. Cro. Car. 221. Jones, 245. Moor, 812. 2. Term Rep. 846.

HE SAID FURTHER, and so was the opinion of THE COURT, that it would be a hard custom for the tenant to claim such trees; for such custom would be to give away the property of the lord; especially in this case, which was occasioned by the act of God. A custom for a copyholder to cut trees is void. Post. 94.

1. Roll. Abr.

108.

1. Brownl. 231.

3. Lev. 131.

Ld. Ray. 551.

HE ALSO QUESTIONED, whether there could be such a custom as for a copyholder to cut timber, he having only a possessory interest, by reason of its being annexed to the copyhold land.

Anonymous.

Cafe 104.

THIS COURT will upon a writ of error take judicial notice of all private customs in private places; for they below are as much bound to proceed upon their customs as the Judges here are upon the common law (a). Private customs here cognizable, &c.

10. Co. 59.

(a) But see *Waples v. Bassett*, 4. Mod. 241. 5. Com. Dig. "Pleader" (C. 38.). 3. K. 3.

Lewis

Hilary Term, 4. Queen Anne, In B. R.

Case 105.

Lewis against Jones.

A variance in trespass on the case cured by verdict.

S. C. Mar. 24.

TRESPASS ON THE CASE. The jury found the defendant guilty of the trespass *aforsaid*.

SIR JAMES MOUNTAGUE excepted against it, because it was a variance; for that trespass *prædict.* was trespass in general.

LETCHMERE answered, that this was holpen by a verdict.

Quod concessum fuit.

* [69]

SIR JAMES took another exception, that by the record it appeared, that damages were assessed by the Court, which would have been fatal, but that it appeared, by the entry of the judgment, that the judgment mentioned the damages and costs assessed *per juratores*; and then it went on, "*per Cur. prædict. modo et forma prædict.*"

Which THE COURT said was idle, and mere surplusage.

Case 106.

Jackson against Humphrys.

In an action against the sheriff of London for an escape from THE COMPTER, it is sufficient to shew, that the plaintiff levied a plaint against the party, and that he was charged in custody.

S. C. Salk. 273.

S. C. Holt, 280.

AN ACTION OF ESCAPE against the sheriff of London. The exception was, that it was not shewn that the party was in custody at the suit of the plaintiff at the time of the escape.

And HOLT, *Chief Justice*, said, they ought to have shewn that he was arrested and taken at the suit of the plaintiff, and then escaped. The like where a man is in custody before any suit. A charge of him in custody is in law an arrest.

DEE said, it was pleaded, that at the time of the escape a plaint was levied in THE COMPTER, whereby he was charged in custody at the suit of the plaintiff.

HOLT, *Chief Justice*, said, "charged" was a vulgar expression, but not a legal one. A person is not in custody of the sheriffs of London until he is brought into THE COMPTER, and be before in the custody of the serjeants. A man is not regularly in custody at the suit of another until a writ is delivered to the sheriff, and arrested; you cannot declare against a man in custody anywhere but in this court: but a process must go to the officer to bring him to the bar. A plaint is in the nature of an original, but not of a *capias*; and the declaring against a man *in custodia maris. balli* is the special custom of this court. But a plaint will not be sufficient to found an escape upon until process goes out to bring him in custody, *viz.* to bring him into court; for by the plaint he is supposed to be at large.

POWELL, *Justice*, differed.

Adjournatur.

Hilary Term, 4. Queen Anne, In B. R.

Adjournatur (a).

(a) The declaration in this case was, that the plaintiff had levied a plaint in the sheriff's court against J. S. he being then in the Compter on a former plaint levied against him by J. N. To this the defendants demurred, insisting, that there ought to have been a precept sued out on the latter plaint, on which the sheriff might have returned a *cepi*. The question was twice argued at the bar, and in Trinity Term, 5. Anne, Holt, Chief Justice, having looked into Mac-

balley's Case, said, that upon entering a plaint in the Compter there never is any precept awarded, but the serjeant at mace arrests the party by his general authority, and therefore there is nothing more to be set forth than is set forth in this case; for by entering the plaint and charging the defendant in the Compter, he is in the actual custody of the sheriff. S. C. 1. Salk. 273.—See also Hart's Case, Cro. Jac. 473.

JACKSON
against
HUMPHREYS.

* [70]
Case 107.

Anonymous.

A MOTION for a prohibition upon an affidavit, because the cause arose out of the jurisdiction, viz. in the Isle of Ely.

No prohibition until plea to the jurisdiction is refused.

But POWELL, Justice, denied it; because the proper way * is to plead it; and if they refuse the plea, then a prohibition.

Brown against Dyer.

Case 108.

IN EJECTMENT the question was, Whether, if a copyholder die, and his wife has her free-bench, this excrement estate do not so take away the discent, as if the son die before the estate actually come to him, that then the next heir to the father shall claim? and, Whether this will not make a *possessio fratris* (a)?

Free-bench of copyhold. Quare, if discent is tolled. S. C. post. 73. 98. 107.

S. C. Holt, 165.

THE CASE, upon a special verdict, was thus. A. being seised of copyhold lands in fee to him and his heirs in Borough English had issue two sons by one venter, and two sons by another venter; and being so seised, he, in the fourth year of Charles the First, surrendered into the hands of the lord, to the use of himself and the heirs male of his body, but no admittance is found; and then he died; the wife having the lands by free bench during her viduity. Then the jury find, that during the life of the wife all the children of A. died without issue, except the eldest son; that then the wife died; and that after her death the eldest son was admitted in the year 1653; that some time after he mortgaged the lands in question to the plaintiff for one hundred pounds; that the mortgagor died; and in 1688 his son and heir, the defendant, was admitted. The plaintiff not receiving his money according to the condition, brings an ejectment.

And the question upon this special verdict was:

FIRST, Whether A. by the surrender 4. Car. 1. was tenant in tail? or, Whether, there being no admittance upon the surrender, the estate in him was changed? for if it were, then the issue in tail would avoid the mortgage.

(a) See the case of Reeve v. Malster, Cro. Car. 411. Jones, 361. and post. 98.

SECONDLY,

Hilary Term, 4. Queen Anne, In B. R.

BROWN
against
DYER.

SECONDLY, Admitting there was no intail in the case, yet being lands in *Borough English*, Whether the reversion after the death of *A.* did not descend to his youngest son by the second venter ? and if so, the eldest son, who was mortgagor, could never, by the rules of law, make himself heir to his brother of the half-blood ; or whether the youngest sons by the second venter, all being dead in the life-time of the *feme*, who had a free-bench, which was a continuance of the estate of her baron, so that there could be no *possessio fratris*, Whether the mortgagor, who was heir at law, and in *Borough English* to his father, had not a right to the estate ?

This case was argued by KING for the plaintiff, and CHESHYRE for the defendant.

But to the first point THE COURT did unanimously resolve, that without admittance on the surrender he did continue seised in fee as before ; for the lord could otherwise have no remedy for his fine, &c. according to 2. Cro. 403. El. 9.

As to the second point THE COURT were divided ; but they thought, that on the authority of *Clements and Scudamore's Case*, in this court, in *Hilary Term*, in the second year of *Queen Anne*, that the heir of the youngest son should have the land ; but they ordered this point to be argued.

In the *Hilary Term* following, THE COURT gave judgment for the plaintiff.

And HOLT, *Chief Justice*, delivered the opinion of his brethren, viz. that the eldest son was in of the fee-simple, for there was no admittance upon the surrender which was made 4. Car. 1.; and therefore the surrenderor did continue seised as he was before.

POWELL, *Justice*, said, there could be no admittance by implication. To the second point he said, that the wife having this customary freehold after the death of her children, and she dying, then the eldest son should take as heir to the father, according to estates at common law. And he said, that where the custom is doubtful, it is the best way to follow the rules of the common law, as this Court did in the case of *Clements v. Scudamore*.

Case 109.

Anonymous.

Admittance implied.

QUÆRE, Whether, if a lord receive rent, or take a fine before admittance, this will not amount to an admittance (a).

(a) That the acceptance of rent, after notice of a surrender, is an admittance in law, see 1. Roll. Abr. 505. if the surrender be previously presented, Cro. Jac. 403. 3. Buld. 219. 240. Yelv. 145.

—Sed vide Bridgen, 82. Poph. 127. 1. Brownl. 143.—The lord is not entitled to the fine till after admittance, 2. Term Rep. 485.

Anonymous.

Hilary Term, 4. Queen Anne, In B. R.

Anonymous.

Case 110.

A WRIT OF ERROR is a *superfedeas* to all proceedings on that judgment (a). Writ of error is a *superfedeas*.

(a) See 1. Salk. 321. Barnes, 205. 209. 2. Bl. Rep. 1183. 5. Com. Dig. "Pleader" (3. B. 12.).

Anonymous.

Case 111.

DEBT ON A JUDGMENT will not lie here until the record be brought here in court. Debt on judgment pending a writ of error.

POWELL, Justice. An action of debt will lie pending a writ of error. Post. 73.

HOLT, Chief Justice. If an escape be against a sheriff, and judgment thereon, and a writ of error is brought, and the first judgment is reversed, the party shall have an *audita querela*.

NOTE, All the matter above is to be spoke to again next Term.

Anonymous.

Case 112.

IF AN APPEAL OF MURDER be brought against three persons, and judgment, they may join in a writ of error; and yet in law they are several judgments, viz. "*et quilibet eorum suspend. per collum*," or they may have several writs of error, according to the nature of the case. But if there are several judgments upon one recognizance, and no joint words, there it was doubted, whether the writ of error ought to be several. If judgment be given on an appeal of death against three appellants, they may all join or sever in a writ of error.

NOTE, The proper way is, to have judgment *secundum formam* of the recognizance.

Quere, If a judgment is several, and costs joint, what writ of error is proper?

* Anonymous.

* [71]

Case 113.

PER CURIAM. In case of a trespass, the tort-feaser ought to tender amends sufficient at his peril; and there needs no previous demand. But in case of an estray, if the owner come and say, "Tell me what is due to you, and I will pay you;" this **HOLT, Chief Justice**, said, is *prima facie* a good tender; for it lies only in the privity of the lord how much is due. And in this last case, the stray is no trespass, but the lord seizes it in right of his franchise. In trespass, tender must be of sufficient amends; contra of an estray.
Go. Ent. 170.

Case 114.

Anonymous.

Amerciament
at a court-ba-
ron.

HOLT, *Chief Justice*, said, he never understood the case of *Wilton v. Hardingham*, in *Hobart* (a), that in case of an amerciament at a court-baron the certain sum need not be set by the Court, but it is enough if it be ascertained by the assessorors.

MR. PENGELLY said, many authorities are otherwise.

(a) The defendant pleaded in justification of a trespass, that the plaintiff was a common baker; that he was presented at a court leet for selling bread contrary to the assize; that thereupon he was amerced, and the amerciament assented to ten shillings, and that by a precept from the Court he distrained the plaintiff for the said ten shillings; and the Court gave judgment for the plaintiff, because it did not appear that the offence was committed within the jurisdiction of the leet, see *Colebrooke v. Elliot*, 3. Burr. 1861.; but **LORD HOBART** noted, that the plea was absurd, because it said, that the plaintiff was amerced, without saying what; for that *the jury* must amerce to a

certain sum, which may be mitigated and assented by others. *Hob. 129.* But in the case of *Mathews v. Cary*, 1. Show. 58, 59. this opinion of **LORD HOBART** is denied to be law; for by **HOLT**, *Chief Justice*, the amerciament ought to be the act of the court, and the assenting to be by the jury; for that the jury cannot amerce; and with this agrees *Beecher's Case*, 8. Co. 59. *Fitz. N. B. 76.* Co. Lit. 126. b. That the amerciament need not be in a sum certain, see *Mirroux*, c. 5. f. 1. *Bro. Abr. "Amerciament,"* 50. *Keilway*, 63. 8. Co. 39. *Cro. Car. 275.* 2. *Keib. 613.* 1. *Salk. 56.* 1. *Show. 62.* 3. *Lev. 206.* 3. *Hawk. P. C. ch. 10. f. 18.*

E A S T E R T E R M,

The Fifth of Queen Anne,

I N

The Queen's Bench,

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

Sir Charles Thorold *against* Smith.

Case 115.

THE DEFENDANT being indebted to *Sir Charles Thorold* in a hundred pounds, *Sir Charles* sent his servant to receive the money. The servant took the goldsmith's note upon *one Johnson*, and thereupon gave a receipt to *Smith*. *Johnson* broke within a week after.

The question was, Whether this was a good payment to *Sir Charles*? or, Whether the servant had pursued his authority in taking a note in lieu of money, and had a power to give a receipt to discharge the debt without receiving the money?

* *HOLT, Chief Justice.* A bill is no payment (a); but if a man will give a receipt, he by that accepts the bill as money and payment; and therefore upon the receipt this case turns.

servant. S. C. Post. 87.—S. C. Holt, 462.

(a) By 3. & 4. Anne, c. 9. s. 7. "If any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, it shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take

"his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest, according to the directions of the act, either for non-acceptance or non-payment." See *Mundal v. Clarke*, 1. Salk. 124. *Kyd on Bills of Exchange*, 111.

* [72]

Easter Term, 5. Queen Anne, In B. R.

SIR CHARLES
THOROLD
against
SMITH.

The principal objection from the Bar was, that the servant had not authority to receive anything but money, and consequently could not discharge the debt upon receiving the bill.

Note.

POWELL, *Justice*, said, *Sir Charles Thorold* should have sent his man back again the same day to have dissented, else it is a presumption, that his master was acquainted with, and acquiesced in, what he had done ; and this might have altered the case.

To which THE COURT agreed ; and said, *Sir Stephen Evans's Case (a)* differed from this case, for *Sir Stephen Evans* became a receiver to the use of *Ward*. If a man give a note to another upon a banker, and no receipt, it is usual to have three days as a convenient time to receive it ; and if the banker break in that time, it will be no payment.

Adjournatur (b).

(a) *Ward v. Evans*, 6. Mod. 36.
S. C. Com. Rep. 138. S. C. 2. Ld.
Ray. 928. S. C. Salk. 442. S. C.
Holt, 120.

(b) See S. C. post. 87.

Case 116.

Bromfeild against Kirber.

Quere, Whether
trespals may be
justified by the
custom of a ma-
nor for common of
vicinage.

4. Co. 38.

JUSTIFICATION OF A TRESPASS by the custom of a manor for common of *vicinage*.

SIR JAMES MOUNTAGUE considered the extent of the word "*vicinus (a)* ;" and argued, that no common can be of this kind, unless between two townships, manors, &c. next adjoining, and not where there is intermediate land ; and that this tort was originally nothing but an excuse of trespass (b).

HOLT, *Chief Justice*. Common of *vicinage* must be next adjoining (c).

WELD. The place is the same, but by several names.

HOLT, *Chief Justice*. The pleading makes it several, and not one entire place.

WELD said, the verdict helped the pleading.

HOLT, *Chief Justice*. The place may be in several manors. The cattle may stray into the next common by reason of *vicinage* ; but they cannot go into a third.

Which WELD said would destroy all such common.

HOLT, *Chief Justice*. "*Vicinus*" is to another purpose ; and is so expounded in 2. *Inst.* between landlord and tenant.

(a) See Year-Book 22. Hen. 6. 39.
Dyer, 47. b. Fitz. N. B. 127. b. 128. a.
and Lord Coke's Commentary upon the
statute of Merton, 2. *Inst.*

(b) See Co. Lit. 122. a. and *Tyrning-
ham's Case*, 4. Co. 38.

(c) See *Sir Miles Corbet's Case*, 7. Co. 5.

POWELL,

POWELL, *Justice*. This sort of * common must be in nature of an escape, and so an excuse; for a man cannot put in his cattle in the *common of vicinage* originally but they must escape. They may inclose one against the other (a), if they will be at the charge. It stands indifferent upon the pleading, whether the places were several or not, and so the verdict helps, for there are but two towns named.

BROMFIELD
against
KIRKIN.

HOLT, *Chief Justice*. People ought to take care to keep their cattle under their own inspection, and not let them stray beyond their bounds. In pleading this kind of common, it ought to be pleaded mutual. If a man go into a *common of vicinage* to drive his cattle off into his own common (for he ought not to keep them in the *common of vicinage*), he may justify this trespass; but if they go into a third common, such excuse perhaps will not hold.

POWELL, *Justice*. The verdict will help; for there is *common of vicinage* found, and but two places, though several names; and they may lie in the same waste.

Adjournatur.

(a) But see Sir William Hickman v. Thorn and Others, 2. Mod. 104; 105.

Brown against Dyer.

Case 117.

IN the case of a surrender to the use of A. the lands were found to be surrendered into the hands of the lord himself in full court; and that the lord assessed a fine upon the surrenderee, but never admitted him (a).

If a copyhold be surrendered, and a fine assessed, but no admittance, the heir of the surrenderee has no title. S. C. ante, 70. S. C. post. 98. 107. S. C. Holt, 165. 1. Roll. Abr. 502. 3. Bulst. 218. Cro. Car. 282.

Adjudged PER TOTAM CURIAM, that the heir of the surrenderee had no title; for that the title of the surrenderee is wholly by the copy of the court-roll, made from the entry upon the court-roll, which before admittance cannot be (b). But in case of a discent, the heir may surrender before admittance, because he has a title by discent (c). But the lord in this case shall have a fine (d).

Cro. Eliz. 349. Cro. Jac. 403.

(a) That a surrenderee may compel the lord to admit, by *mandamus*, see Rex v. Troward, 2. Term Rep. 484.

(b) See Taylor v. Wheeler, 2. Vern. 364. Woollams v. Clapham, 1. Term Rep. 600.

(c) 4. Co. 22. Dyer, 291. Noy,

172. Moor, 596. 1. Leon. 100. Cro. Car. 596. Cro. Eliz. 662. Cro. Jac. 36. 1. Mod. 120.

(d) That the lord is not entitled to the fine until after admittance, see 2. Term Rep. 485.

Case 118.

Keble *against* Hickringill.

A declaration in an action on the case, that the defendant was possessed of a certain close, and a decoy therein; and that the defendant knowingly, and with intention to injure him by preventing ducks from coming to the decoy, did, on divers times, maliciously shoot off guns, &c. is good, although it is not stated that the defendant entered the close.

DARNEL, Serjeant (a). Wild ducks are not such *game* as the law takes notice of; nor is a *decoy* a franchise, or comprehended within the word "*royalty*" (which **THE COURT** said signified a *free warren*); but *royalty* had no such signification as is here claimed. Neither could a lord of a manor justify under a *royalty* to fish, hunt, or fowl in another man's soil (b). A decoy is not a privileged place: if it were, he must have it by grant or prescription (c). There is only a possessory property, so as to kill them when they are there.

BRODERICK, Serjeant, contra. The declaration is, that the plaintiff was possessed of a piece of ground, whereupon a *decoy*, &c. and that the defendant *malitiosè*, intending to deprive him of the benefit, came to the pond-head, and there disturbed, &c.; and after verdict for the plaintiff, the Court will intend an entry upon his ground, though it is not laid in the declaration; and saying he came to the pond-head must be taken to be his ground. A man,

while things that are *feræ naturæ* are upon his ground or soil, has such a possessory property, that if one kill the game (though he does not enter) he shall have an action of trespass for entering his ground (d), and shall recover damages for the thing killed (e). If a man put up a hare in my ground, and follow it, and kill it in the ground of J. S. yet I may take it. If a man has a market and right of toll, and another disturb people coming to the market, it is uncertain whether any goods may be sold, and consequently no ill; yet for the possibility of sale I may have an action. A man ought not so to use that which is his own as to hurt the property of another. Whenever there is malice and damage, a man may have an action on the case (f).

HOLT, Chief Justice, said, he was not satisfied with this case.—It is agreed on all hands, that while the ducks are in the pond the plaintiff has a property, and the defendant was a wrong-doer to disturb him; but to intend that he entered, or that he came upon his ground, would be too material to * intend, it being trespass. But suppose the defendant had shot in his own ground, if he had had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong; he likened it to the case of a market and toll. It must be taken as it is found upon the record; but it is found to be done *malitiosè*, and so it appeared upon the evidence.

(a) See the several objections taken in this case, S. C. Holt, 17.

(b) 1. Jones, 44 C. 1. Vent. 122.

(c) Fitz. N. B. 36, 37. 3. Lev. 227.

(d) Keilway, 203.

(e) 12. Hen. 8. pl. 10.

(f) 3. Keb. 753. and 1. Vent. 348.

Easter Term, 5. Queen Anne, In B. R.

POWELL, *Justice*. Every one has a property of things *feræ naturæ ratione soli*. A man may have a free warren in another man's soil, which he has *ratione privilegii*, and not *soli*, for one man may have a privilege in another man's freehold. A man may have such a property in hares, as if he put it up in his ground, and course and kill it in another man's ground, still the original property is in him; and the coursing is a continuance of this property. As this case is, the defendant has done an injury to the plaintiff's property; for by frightening them away you have destroyed his property.

KARLE
against
HICKINGILL.

POWYS and GOULD, *Justices*, to the same intent. A man may lawfully shoot in his own ground, as to kill venison, &c. but not to destroy *maliciously* the property of another.

Adjourned, and to stand in the paper until next Term (a).

(a) In Trinity Term, 6. Anne, HOLT, was given for the plaintiff, S. C. Holt, Chief Justice, delivered the opinion of the court, S. C. post. 130. and judgment 20.

The Queen against Truebody.

Case 119.

MANDAMUS to restore a burgess to his freedom. But it appeared by the return, that he had abdicated the corporation for above four years last past; and that he had removed himself and family fifteen miles off; and that he had been summoned to attend, and did not; whereupon they discharged him.

If a burgess totally desert the borough, he may be removed from his office.

S. C. 2. Ld. Ray.

1275.

S. C. Holt, 449.

Dougl. 144. 569.

AND HELD well (a). If a man attend his office, though he live out of the corporation, yet his attendance upon the office will be a sufficient residence.

POWELL, *Justice*, doubted, if a man live out of the jurisdiction, whether they need summon him out of the jurisdiction? It seems not (b); but if he voluntarily attend, he answers his duty.

(a) City of Exeter v. Glide. 4. Mod. 36. 1. Show. 258. 364. Rex v. Mayor of Leicester, 4. Burr. 2087. Rex v. Mayor of Newcastle, 1. Burr. 530. Rex v. Lyme Regis, Dougl. 149.—See also 2. Kyd on Corporations, 73.

(b) See Grimes' Case, 5. Burr. 2598. in which it is expressly determined, that a summons is not necessary where a member of a corporation is not resident within the town.—See also 1. Kyd on Corp. 443.

* Brook against Hustler.

Case 120.

ENGLAND, } OUR LADY THE QUEEN hath sent to her trusty and well-beloved Sir Thomas Trevor, Knt. her Chief Justice of the Bench, her writ closed in these words, to wit: Anne, by the grace of God, of England, Scotland, France, and Ireland, queen, defender of the faith, &c. To her trusty and well-beloved Sir Thomas Trevor, Knt. her Chief Justice of the Bench, greeting: Forasmuch as in the record and proceedings,

Salk. 56.

Rep. A. Q. 76.

S. C.

Easter Term, 5. Queen Anne, In B. R.

BROOK
against
HUSTLER.

and also in the giving of judgment of the plaint which was in our court before you and your brethren, our justices of the bench, by our writ between *Sir William Hustler, Sir Richard Osbaldeston, Knts. and William Osbaldeston, Esq. and Thomas Brook*, late of *Overston*, in the county of *York*, yeoman, of a debt of seventy and nine shillings and elevenpence, which the same *William, Richard, and William*, demand of the said *Thomas*, as it is said, manifest error hath intervened, to the great damage of the same *Thomas*, as we are informed by his complaint: we, willing that the error, if any was, be duly amended, and that full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and plainly, under your seal, the record and proceedings aforesaid, with all things touching the same, and this writ; so that we may have them from the day of *Easter* in fifteen days wheresoever we shall then be in *England*; that we having inspected the record and proceedings aforesaid may cause further to be done thereupon for amending the said error, which of right and according to the law and custom of our kingdom of *England* shall be meet to be done. Witness Ourself at *Westminster*, the second day of *March*, in the second year of our reign.

HUNGERFORD.

The answer of *SIR THOMAS TREVOR, KNT.* Chief Justice within named.

THE record and proceedings of the plaint within-mentioned, with all things touching the same, I send before our lady the queen, wheresoever, &c. at the day within-contained, in a certain record to this writ annexed, as I am within commanded.

THO. TREVOR.

Pleas inrolled at *Westminster*, before *SIR THOMAS TREVOR, KNT.* and his fellow Justices of our lady the queen of the common bench, of the Term of *St. Hilary*, in the second year of the reign of our lady *Anne*, by the grace of God, of *England, Scotland, France, and Ireland*, queen, defender of the faith, &c. Roll 1228.

Declaration for
an amercement
in a court-leet.
Seisin of King
James the First
in a court leet.

Yorkshire, to wit. *Thomas Brook*, late of *Overston*, in the county aforesaid, yeoman, was summoned to answer *Sir William Hustler, Knt. Sir Richard Osbaldeston, Knt. and William Osbaldeston, Esq.* of a plea that he render to them seventy and nine shillings and elevenpence, which he owes to them and unjustly detains, &c. And whereupon the same *Sir William Hustler, Sir Richard and William Osbaldeston*, by *Robert Hopkinson* their attorney, say, that our lord *James the First*, late King of *England*, was seised in right of his crown of *England* as of fee and right of and in the court-leet and view of frank-pledge with the appurtenances, and all and every thing which to a court-leet or view of frank-pledge belonged, or in any manner appertained, or ought to belong or appertain, within the manors or lordships, villages or hamlets, of *West Bretton, Cawthorn, Overston, and Netherston*,

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Netherflocton, in the said county of *York*, and within the precincts of the same manors or lordships, villages and hamlets, and every of them, in the said county of *York*, being or not being parcel of the duchy of *Lancaster*, of all resident and inhabiting within the manor or lordship, village and hamlet, before said, and within the precincts of the same manors or lordships, villages and hamlets, and every or any of them; the said court-leet and view of frank-pledge afore said to be holden twice by the year within the manors or lordships, villages and hamlets, afore said, or any of them, or within the precincts of the same manors or lordships, villages and hamlets, or any of them, at such days and times in the year as the said lord *King James the First*, his heirs or assigns, should see fit, convenient, and necessary, according to the law and custom of this kingdom of *England*, before the steward of the said lord the king of that court, or the deputy of such steward for the time being: and being so seised, the late *King James the First* afterwards, by his letters patent under the great seal of *England*, and under the seal of the duchy of *Lancaster*, in like manner made, bearing date at *Westminster*, in the county of *Middlesex*, on the twenty-ninth day of *June*, in the thirteenth year of his reign in *England*, and the forty-eighth in *Scotland*, which the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston* here in court produce, as well for and in consideration of the sum of twenty shillings of lawful money of *England*, well and truly to be paid at the receipt of his exchequer at *Westminster*, to his own use, by his beloved subject *George Wentworth*, of *Bulkcliffe*, in *West Bretton*, in the county of *York*, gent. whereof the same late lord the king did acknowledge himself to be fully satisfied and paid, as for divers other good causes and considerations the same lord the king especially moving, of his especial grace and certain knowledge and mere motion, did give and grant for himself, his heirs and successors, to the said *George Wentworth*, his heirs and assigns for ever, that they should and might have, hold, and enjoy, within the manors or lordships, villages, or the hamlets of *West Bretton*, *Cawthorn*, *Overflocton*, and *Netherflocton*, and every of them, in the said county of *York*, and within the precincts of the same manors or lordships, villages and hamlets, and every of them, in the said county of *York*, being or not being parcel of the said duchy of *Lancaster*, a court-leet and view of frank-pledge, to be held of all the residents and inhabitants, and other residents coming within the lordships or manors, villages and hamlets afore said, and within the precincts of the same manors or lordships, villages and hamlets, and every or any of them; to hold the said court-leet and view of frank-pledge twice by the year, from time to time within the manors or lordships, villages and hamlets, afore said, or any of them, or within the precincts of the same manors or lordships, villages and hamlets, or any of them, at the same places, days, and times, at which the said *George Wentworth*, his heirs or assigns, should see fit, convenient, and necessary, according to the law and custom of this kingdom of *England*, before the steward

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against
HUSTLER.

Grant thereof to
Wentworth by
letters patent
under the duchy
seal.

To be held twice
a year, at such
days as the
grantee should
think fit.

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Brook
against
HUSTLER.

Grantee seised,
and held several
courts, and died.

Discent to his
son and heir,
who was seised,

and died with-
out issue, where-
by they descend-
ed to his bro-
ther;

who died also
without issue,
whereby they
descended to his
brother,

After whose
death they de-
scended to his
son, who en-
tered,

Steward of the same *George Wentworth*, his heirs and assigns for the time being; or before the deputy of such steward for the time being; and all and whatsoever to the said court-leet or view of frank-pledge belonged, or in any wise appertained, or in any manner ought to belong or appertain; and also all and singular amer- ciaments, fines, forfeitures, pains, penalties, perquisites, profits, liberties, preheminences, privileges, rights, and jurisdictions, what- soever, which at the said courts-leet or view of frank-pledge to the said lord the king, or his successors, in any manner whatsoever might or ought to belong: by virtue of which said letters patent the said *George Wentworth* was seised as of fee and right of and in the court-leet and view of frank-pledge afore said, with the appur- tenances; and held divers courts and views of frank-pledge within the manors or lordships, villages or hamlets, of *West Bretton*, *Cawthorn*, *Overflosson*, and *Netherflosson*, afore said, according to the gift and grant afore said, in the letters patent contained: and the said *George* being so seised of the court-leet and view of frank- pledge afore said, with the appurtenances, afterwards, to wit, on the second day of *June*, in the year of Our Lord one thousand six hun- dred and thirty-eight, at *Netherflosson* afore said, died; after whose death, the said court-leet and view of frank-pledge, with the appur- tenances, did descend to *William Wentworth*, gent. as son and heir of the said *George*, whereby the said *William Wentworth*, son and heir of the said *George*, was seised as of fee and right of and in the court-leet and view of frank-pledge afore said, with the appurte- nances: and being so seised thereof, the same *William* afterwards, to wit, on the fourth day of *March*, in the year of Our Lord one thousand six hundred and thirty-nine, at *Netherflosson* afore said, died without any issue of his body; after whose death the said court-leet and view of frank-pledge, with the appurtenances, de- scended to *Thomas Wentworth*, esq. afterwards *Sir Thomas Wentworth*, baronet, as brother and heir of the said *William Wentworth*, whereby the said *Thomas Wentworth*, as brother and heir of the said *William Wentworth*, was seised of and in the court-leet and view of frank-pledge afore said, with the appurtenances, as of fee and right: and being so seised thereof, the said *Sir Thomas* after- wards, to wit, on the first day of *April*, in the year of Our Lord one thousand six hundred and seventy-six, at *Netherflosson* afore said, died, without any issue of his body issuing; after whose death the said court-leet and view of frank-pledge, with the appurte- nances, did descend to *Sir Matthew Wentworth*, baronet, as brother and heir of the said *Sir Thomas Wentworth*, whereby the said *Matthew*, as brother and heir of the said *Sir Thomas Wentworth*, was seised of and in the court leet and view of frank-pledge afore- said, with the appurtenances, as of fee and right: and being so seised thereof, the same *Sir Matthew* afterwards, to wit, on the second day of *August*, in the year of Our Lord one thousand six hundred and seventy-eight, at *Netherflosson* afore said, died; after whose death, the said court leet and view of frank-pledge, with the ap- purtenances,

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appurtenances, descended to *Sir Matthew Wentworth*, baronet, as son and heir of the said *Sir Matthew Wentworth* the brother, whereby the said *Sir Matthew Wentworth* the son was seised of and in the court-leet and view of frank-pledge aforesaid, with the appurtenances, as of fee and right : and the said *Sir Matthew* the son being so seised thereof, afterwards, to wit, on the eighth day of *December*, in the year of Our Lord one thousand six hundred and ninety-three, at *Netherfoeton* aforesaid, by a certain indenture of bargain and sale made between the said *Sir Matthew Wentworth* the son, of the one part, and the said *Sir William Hustler*, *Sir Richard Osbaldeston*, and *William Osbaldeston*, of the other part, the other part whereof, sealed with the seal of him the said *Sir Matthew* the son, the same *Sir William*, *Sir Richard* and *William Osbaldeston* produce here in court, the date of which is the same day and year, in consideration of five shillings to him in hand paid by the said *Sir William*, *Sir Richard* and *William Osbaldeston*, bargained and sold to them the said *Sir William*, *Sir Richard* and *William*, the said court-leet and view of frank-pledge, with the appurtenances, to have and to hold to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, their executors, administrators, and assigns, from the day of the date of the said indenture to the end and term of one year then next following, and fully to be complete and ended : by virtue of which said bargain and sale, and by force of the statute in that behalf made and provided of transferring uses into possession, the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, were in possession of the court-leet and view of frank-pledge aforesaid for that term : and being thereof so possessed, and the said *Sir Matthew Wentworth* the son being seised of the reversion of the court-leet and view of frank-pledge aforesaid, with the appurtenances, as of fee and right, afterwards, to wit, on the ninth day of *December*, in the year of Our Lord one thousand six hundred and ninety-three aforesaid, at *Netherfoeton* aforesaid, by a certain other indenture made between him the said *Sir Matthew Wentworth* the son of the one part, and the said *Sir William Hustler*, *Sir Richard Osbaldeston*, and *William Osbaldeston*, of the other part, the other part whereof, sealed with the seal of the said *Sir Matthew* the son, the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, produce here in court, the date whereof is the same day and year above-mentioned, he, the said *Sir Matthew Wentworth* the son, released to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, their heirs and assigns, all the estate, right, title, and interest, of him the said *Sir Matthew Wentworth* the son, of and in the court-leet and view of frank-pledge aforesaid, with the appurtenances : by virtue of which premises the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, were, and still are, seised of and in the court-leet and view of frank-pledge aforesaid, with the appurtenances, as of fee and right : and that *Thomas Brooke*, on the twenty-fourth day of *April*, in the year of Our Lord one thousand seven hundred and three, and long before, was resident and an inhabitant at *Overfoeton* aforesaid, within the

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against
HUSTLER.

and by lease
and release con-
veyed to the
plaintiffs.

Plaintiffs, seized.

Defendant an
inhabitant with-
in the jurisdic-
tion of the leet,
and owed suit.

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BROOK
against
HUSTLER.

Court held April
24, 1703.

Notice was given
to the inhabitants.

Defendant made
default in not
appearing,
wherefore the
jury presented
him,

and he was amerced by the
court, and assessed by two
assessors, chosen and sworn,
at 19s. 11d. of
which he had
notice.

By which their
action accrued
to the plaintiffs.

Mutatus for
40s.

the jurisdiction of the leet and view of frank-pledge aforesaid, and ought to do suit at the court of view of frank-pledge aforesaid: and they the said *Sir William Hustler, Sir Richard* and *William Osbaldeston*, being so as aforesaid seised of the court-leet and view of frank-pledge aforesaid, with the appurtenances, the court-leet and view of frank-pledge aforesaid was held at *Netherflosson* aforesaid, within the manors and lordships aforesaid, the said twenty-fourth day of *April*, in the year of Our Lord one thousand seven hundred and three, before *Richard Wotton*, esq. steward of the said *Sir William Hustler, Sir Richard* and *William Osbaldeston*, of that court, of which court so to be held due notice was given to the residents and inhabitants within the manors, lordships, villages, and hamlets aforesaid, to wit, at *Netherflosson* aforesaid; and that the said *Thomas Brook* did not do his suit, nor appear at that court, but made default; wherefore at the same court, by the jurors who were sworn and charged in the same court to inquire and present those things which appertained to the said court-leet and view of frank-pledge, it was presented upon their oath, that the said *Thomas Brook* then was resident and an inhabitant within the manors aforesaid, and within the jurisdiction of the court of view and frank-pledge aforesaid, and ought to have done suit to the court of view and frank-pledge aforesaid; and that the said *Thomas Brook*, although he was then solemnly summoned, did not appear, but made default; by reason whereof the same *Thomas Brook* was then and there, by the same court, amerced; which said amercement by *Joseph Senior* and *Timothy Roads*, then residents and inhabitants within the manors aforesaid, then and there chosen and sworn assessors by the same court, was then in due manner assessed to thirty-nine shillings and elevenpence of lawful money of *England*; whereof the said *Thomas Brook* afterwards, to wit, the day and year last-mentioned, at *Netherflosson* aforesaid, had notice, whereby an action accrued to the same *Sir William Hustler, Sir Richard* and *William Osbaldeston*, to demand and have of the said *Thomas Brook* the said thirty-nine shillings and elevenpence, parcel of the aforesaid seventy-nine shillings and elevenpence. And whereas also the said *Thomas Brook* afterwards, to wit, on the first day of *July*, in the year of Our Lord one thousand seven hundred and three, at *Netherflosson* aforesaid, borrowed of the said *Sir William Hustler, Sir Richard* and *William Osbaldeston*, forty shillings, residue of the aforesaid seventy-nine shillings and elevenpence, to be paid to the said *Sir William Hustler, Sir Richard* and *William Osbaldeston*, when he should be thereunto required; nevertheless the said *Thomas Brook*, although often requested, hath not yet paid the aforesaid seventy-nine shillings and elevenpence, nor any part thereof, to the same *Sir William Hustler, Sir Richard* and *William Osbaldeston*, or either of them, but hath hitherto refused, and still refuses, to pay the same to them or any of them; wherefore they say, that they are injured and have damage to the value of one hundred shillings; and thereupon they bring suit, &c.

And

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And the aforesaid *Thomas Brook*, by *Henry Wood* his attorney, comes and defends the force and injury when, &c. and says nothing in bar or preclusion of the said action of the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*: whereupon the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston* remain against the said *Thomas Brook* thereupon undefended: therefore it is considered, that the said *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, do recover against the said *Thomas Brook* their said debt, and their damages by occasion of the detention of that debt, to eight pounds, by the Court here adjudged to the same *Sir William Hustler*, *Sir Richard* and *William Osbaldeston*, by their assent: and the same *Thomas Brook* in mercy, &c.

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against
HUSTLER.

Nil dicit.

Judgment.

Afterwards, that is to say, on *Tuesday* next after eight days from the day of *St. Hilary* in the same Term, before the lady the queen at *Westminster*, comes the aforesaid *Thomas Brook*, by *Thomas Harvey* his attorney, and saith, that in the record and proceedings aforesaid, and also in giving of the judgment aforesaid, there is manifest error, in this, to wit, that the declaration aforesaid in the record aforesaid mentioned, and upon which the judgment aforesaid in form aforesaid is given, and the matter in the same contained, are not sufficient in law to have or maintain that judgment thereupon given in form aforesaid; and so the same judgment thereupon in form aforesaid given is erroneous and void in law; and therefore in that there is manifest error. There is error also in this, that where it appears by the said record that the said judgment in form aforesaid given was given for the said *Sir William Hustler*, knight, *Sir Richard Osbaldeston*, knight, and *William Osbaldeston*, against him the said *Thomas Brook*; whereas by the law of the land of this kingdom of *England*, judgment in the plea aforesaid ought to have been given for the said *Thomas Brook* against them the said *Sir William Hustler*, *Sir Richard Osbaldeston*, and *William Osbaldeston*; and therefore in that there is manifest error: and he prays, that the said judgment for the errors aforesaid, and others being in the record and proceedings aforesaid, be revoked, annulled, and altogether deemed as none: and that the same *Thomas Brook* be restored to all things which, by occasion of the judgment aforesaid, he hath lost: and that the said *Sir William Hustler*, knight, *Sir Richard Osbaldeston*, knight, and *William Osbaldeston*, may rejoin to the errors aforesaid, &c. And the said *Sir William Hustler*, knight, *Sir Richard Osbaldeston*, knight, and *William Osbaldeston*, by *Adrian Moore* their attorney, come and forthwith say, that there is not any error either in the record and proceedings aforesaid, or in the giving the judgment aforesaid; and pray that the court of the lady the queen now here may proceed to the examination as well of the record and proceedings aforesaid as of the matters aforesaid by him the said *Thomas Brook* above assigned for errors, and that the judgment aforesaid be in all things affirmed.

Errors assigned.

Joinder in errors.

Judgment affirmed.

Brook

Cafe 121.

Brook against Hustler.

ERROR OUT OF THE COMMON PLEAS, upon a judgment in debt, for an *amerciament* in A COURT-LEET. The defendant made default of suit after a general notice, and the *amerciament* was affeered.

HOLT, Chief Justice. The jury may *amerce* in a certain sum if they will, and then there needs not an *affeermēt*; though the proper way is, "*ideo fit in misericordiā*," and then an *affeermēt* (a).

S. C. 1. Salk. 56.
S. C. Lex. Man.
Ap. 19. Show. 62. Hob. 122. Lev. 206. 3. Mod. 138. 3. Burr. 1869.

In debt for an *amerciament* in a court-leet, it must be shewn, that the party was summoned to the court at such a day and place.

PENGELLY took an exception, that the court being uncertain when it will be held (that is, where the lord may hold it when he pleases), a particular and convenient notice ought to be given *when* and *where* the court is to be held (b). A general notice in the church is not a sufficient notice to incur a forfeiture, unless there be a particular custom for it (c).

SERJEANT CHESSHYRE contra. It is found that due notice was given, and this the Judge of assize is supposed upon the evidence to direct the jury.

HOLT, Chief Justice. We cannot judge of the notice, because you ought to have shewed particularly, that he was summoned to the court at such day and place to be held.

POWELL, Justice. To take advantage of a forfeiture, notice should be personal, unless there is a particular custom to the contrary. In antient leets, personal notice perhaps is not necessary; but notice in the church or in the market may be well. But otherwise where it is not an ancient leet. 1. *Brown*, 166. *Winch*, 987. *Co. Ent.* tit. "Error," 289, 284.

Adjournatur.

(a) See 3. Hawk. P. C. ch. 10. f. 18.

(c) *Tavener v. Cromwell*, Cro. Eliz.

accord.

353.

(b) 32. or 22. *Edw.* 4. pl. 27. b.

28. a.

MOTION FOR A PROHIBITION. The plaintiff in the spiritual court was a parson, and the defendant said to him these words: "Thou art a sauce-box, firrah! a rascal and scoundrel fellow, and wilt make an affidavit to anything."

*** WELD, Serjeant.** A prohibition ought not to go; for to say a man will swear anything is a great scandal, much more to say so of a clergyman; and cited 2. *Roll. Abr.* 297. 295. 1. *Keb.* 521. 2. *Lutw.* 153. 3. *Lev.* 17. 2. *Keb.* 439. *March's Rep.* 153.

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PAGE *contra*. These words import matter of heat, and not of scandal; and they only shew the opinion his client had of him at that time.

See
again
Buxton.

HOLT, *Chief Justice*. Suppose the words in this libel had been spoke of a layman, could he have had an action? No. Then how the more for his being a clergyman? for the words do not touch him immediately in his office. To say a parson is "a rascal" is no more than to call him rascal (*a*).

POWELL, *Justice*. There is a difference between defaming a parson and a layman, but then it ought to be something for which he may be drawn in question in the ecclesiastical court (*b*). He said, he remembered a case in the common pleas for calling a parson "pimp," and they would not grant a prohibition; for that the word "pimp" had a common and known signification; and the like in calling a layman so. In the first words here there is nothing scandalous; and then it adds, "You will make an affidavit to anything;" this does not charge him with any act which can draw him into question thereof.

POWYS, *Justice*. Here is no *colloquium* of his function, and the words import only heat. Suppose he had said, "You will murder a man," this is only the opinion he had of him, &c.

GOULD, *Justice*, remembered the word "pimp" was adjudged to be one who "procured women." But he thought in this case, that, taking the whole together, they imported a great scandal.

And afterwards POWELL, *Justice*, desired time to consider of it; for all the books make a difference between defaming a parson and a layman;

Which HOLT, *Chief Justice*, said, he saw no reason for; for the characters and consciences of other men are as tender, and of as great concern to them, as a parson's.

But POWELL, *Justice*, said, to call a parson "knave," a prohibition has been denied (*c*); but no doubt but it will be granted in a layman's case.

Adjournatur.

(*a*) See *Musgrave v. Bovey*, that the spiritual court cannot take cognizance of the words, "You are an old rogue and a rascal; and a contemptible fellow; despised and hated by everybody;" said by one parson to another parson. 2. Stra. 946.

(*b*) See 2. Inst. 492. 4. Co. 20. 7. Co. 44. Fitz. N. B. 51. Lutw.

1038. 1042. Bunb. 260. 312. Stra. 823. 6. Com. Dig. "Prohibition" (G. 14.).

(*c*) See 2. Roll. Abr. 297. Lutw. 1054. 1. Sid. 393. and the case of *Nelson v. Hawkins*, 12. Mod. 104. S. C. Holt, 593. 8. C. Comy. Rep. 25. S. C. 1. Ld. Ray. 423.

General

Cafe 123.

* General Rule.

A special imparlance must be moved for.

HOLT, Chief Justice, said, Let this be a general rule of court: That no special imparlance be, unless by motion to the Court, and shew reasons for it.

g. Bl. Rep. 1097. Sellon's Practice, 292. Rules and Orders B. R. 199.

Cafe 124.

Anonymous.

Debt lies pending a writ of error.

THE COURT doubted, Whether debt would lie upon a judgment pending a writ of error. See 1. Lev. 153. 1. Sid. 2. Vent. 261.

HOLT, Chief Justice, said, **VAUGHAN** was of a different opinion from **HALE** in this matter.

Et adjournatur (a).

(a) But the law seems now settled, that a writ of error stays all proceedings whatsoever. NOTE to former edition.— And see *Glanville v. Dighton*, Skin. 388. *S. C. Holt*, 199. *S. C. Comb.* 299. accord. *Rowley v. Raphson*, Skin. 590. *Rogh v. Cooling*, 2. Show. contra.— And that debt will lie on a judgment pending a writ of error, see *Rottenhoffer v. Lenthall*, 1. Show. 146. *Adams v. Tomlinson*, 1. Sid. 236. *Gale v. Till*, 3. Lev. 397. *Syms v. Timms*, 1. Show. 98. But the Court will or will not stay

the proceedings in the action according as it shall appear that the writ of error was or was not brought merely for delay. *Meyer v. Arthur*, Stra. 419. *Taswell v. Stone*, 4. Burr. 2454. *Gribble v. Abbott*, Cowp. 72. *Entwistle v. Shepherd*, 2. Term Rep. 78. *Christie v. Richardson*, 3. Term Rep. 78. *Kempland v. Macauley*, 4. Term Rep. 436.— And the defendant cannot apply to have the proceedings stayed until he has put in bail, *Smith v. Shepherd*, 5. Term Rep. 9.

Cafe 125.

Anonymous.

A general non dampnificatus to particular assignments.

HOLT, Chief Justice. A bond to save harmless against several particular things, and after in general; here, to a general declaration, non dampnificatus is a good plea, and then the plaintiff should shew a breach; though perhaps it is better to answer to the particular things, and then to say *quoad* the rest non dampnificatus, *Atkins v. Hill (a)*. The plaintiff should have assigned a particular breach before he had demurred.

(a) Cro. Eliz. 253. Sayre v. Mimms, Cowp. 375.

Cafe 126.

The Queen against Drake.

It is libellous to write, that "THE REVOLUTION was the destruction of the law of England."

INFORMATION that he wrote a scandalous libel, intituled, "Mercurius Politicus," in which is contained several libellous matters *inter alia*, and set it forth *secundum tenorem sequentem*.

On a special verdict, they find all but "not" instead of "nor." It was "nor" in the record, and "not" in the paper.

"*lord*."—S. C. post. 84. 95. S. C. 2. Salk. 665. S. C. 3. Salk. 224. S. C. Holt, 347. 425.

MR.

Easter Term, 5. Queen Anne, In B. R.

MR. SOLICITOR said, the principal scandal was, "That the late REVOLUTION was the destruction of the laws of England."

THE QUEEN
against
DRAKE.

The information being set forth *in hæc verba*, and there being a variance, he said, was the objection from the other side. But if the substance was found, it was sufficient to make it a libel, especially it being an immaterial variance; for "not," he said, carried in it the same sense as "nor;" therefore admitting it a variance, it is an immaterial variance (a). A man may declare for words in Latin which were spoke in English, which shews that the substance only is regarded by the law.

If, in an information for a libel, the libel is recited "ACCORDING TO THE TENOR following," a variance of "not" instead of "nor" is fatal.

MR. LUTWICH *contra*. The question is, Whether the information is * for the same libel? It is said to be "*secundum tenorem sequentem*;" now the word "tenor" is the thing itself, and ought to be a true copy of it (b). This differs from the laws of words, because in this case the matter is reduced to writing. In an action upon the case for a malicious indictment, in the declaration there should be no variance; because they may have a sight of the record. So here, for they had the book to guide them.

[79]

S. C. post. 34.
95.

Adjourned until the next Term.

(a) Dyer, 75. Sir John Bridge's Case, Cro. Jac. 407. Hob. 180.
(b) Register, 169. a.
1. Roll. Rep. 421. Cro. Eliz. 503.

Anonymous.

Case 127.

WHEN A PERSON complains to this Court of a misdemeanor, Privilege from arrest, and it is adjudged that his complaint is vexatious, THIS COURT will not allow the privilege of protecting him returning.

The Queen against Atkinson and Others.

Case 128.

BOROUGH OF LEEDS, } HERETOFORE, that is to say, on the tenth day of January in the third year of the reign of our lady Anne, by the grace of God, Queen of England, &c. at the general quarter-session of the peace of the lady the queen, holden at Leeds for the borough aforesaid, before Edmund Barker, esq. mayor, Jasper Blythman, esq. recorder, Thomas Dixon, William Rooke and others their fellows, aldermen and justices of the said lady the queen, assigned to keep the peace within the borough aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed and done in the same borough, and from thence continued and holden by adjournment at Leeds aforesaid for the borough aforesaid, on the fourteenth day of February in the year abovesaid, before the said Edmund Barker, mayor, Jasper Blythman, recorder, and William Rooke, and before Thomas Kitchingham, John Dodgson and others their fellows, justices of the said lady the queen as aforesaid,

Indictment against the collectors of a tax for falsely extorting money under colour of their office.

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H

assigned

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THE QUEEN
against
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AND OTHERS.

assigned to keep the peace within the borough aforesaid, by the oath of twelve jurors, of good and lawful men of the borough aforesaid, impanelled, sworn and charged to inquire for the said lady the queen, for the body of the borough aforesaid, it was presented, that whereas on the twenty-fourth day of *March*, in the second year of the reign of our lady *Anne*, by the grace of God, now *Queen of England, &c.* *John Atkinson*, late of *Leeds* in the borough aforesaid, linen draper, and *William Barstow*, late of *Leeds* aforesaid in the borough aforesaid, grocer, then being collectors of several sums assessed upon the inhabitants of a certain liberty called *Leeds Upper Division* within the borough aforesaid, mentioned and expressed in a certain assessment made and confirmed in pursuance of a certain act of parliament made in the first year of the reign of our said lady the now *Queen of England, &c.* intitled "An act for granting an aid to her majesty by divers subsidies and a land-tax," the said *John Atkinson* and *William Barstow* on the said twenty-fourth day of *March* in the abovesaid second year of the reign of the said lady the now queen, at *Leeds* aforesaid in the borough aforesaid, by colour of the office aforesaid, unlawfully, extorhvely and deceitfully, and of their own wrong, exacted, received and had of one *Thomas Calverly*, then of *Leeds* aforesaid in the borough aforesaid (being not assessed at all by virtue of the act of parliament aforesaid) the sum of four shillings, and that the said *John Atkinson* and *William Barstow* the same sum of four shillings so as aforesaid of the said *Thomas Calverly* unlawfully, extorhvely and deceitfully exacted, received and had, and to the proper use of them the said *John Atkinson* and *William Barstow* then and there unlawfully, injuriously and deceitfully converted, to the great damage of him the said *Thomas Calverly*, to the evil example of all other delinquents in such case, and against the peace of the said lady the now queen, her crown and dignity; which said indictment the said lady the now queen afterward, for certain causes made to come to be determined before her, by which the sheriff of the county of *York* is commanded, that he do not omit, &c. but that he cause them to come to answer, &c. And now, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same Term, before the lady the queen at *Westminster*, come the said *John Atkinson* and *William Barstow* by *Francis Pember* their attorney, and having severally heard the indictment aforesaid say, that they do not apprehend that the said lady the now queen will or ought any further to impeach or trouble them the said *John* and *William* for the premises, because they say that the said indictment, and the matter in the same contained, are not sufficient in law, to which they have no necessity, neither are they bound by the law of the land in any manner to answer, and for the insufficiency thereof pray judgment, and that they may be dismissed of the premises by the Court here, &c. And *Simon Harcourt*, esq. coroner and attorney of the said lady the queen, in the court of the said queen, before the queen herself, who prosecutes for the said lady the queen in this behalf, saith, that the indictment aforesaid, and the matter

Demurrer.

Joinder.

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matter in the same contained, are good and sufficient in law to compel the said *John Atkinson* and *William Barstow* to answer to the same indictment; which said indictment, and the matter in the same contained, the said coroner and attorney of the said lady the queen, for the said lady the queen, is ready to verify and prove, as the Court, &c. Wherefore since the said *John Atkinson* and *William Barstow* have not answered to the said indictment, nor deny the matter in the same contained, the said coroner and attorney of the said lady the queen, for the said lady the queen, prays judgment, and that the said *John Atkinson* and *William Barstow* may be convicted of the premises in the said indictment above laid to their charge, &c.

THE QUEEN
against
ATKINSON
AND OTHERS.

The Queen against Atkinson and Others.

Case 129.

INDICTMENT, That the defendants being collectors of several duties and sums of money, collected of *A. B.* not being assessed, and converted the same to their own use. The defendants demurred.

If two collectors of rates collect money fraudulently from the same person, they may be indicted for it jointly.

CHESHIRE, Serjeant, excepted against their being joined in the indictment; for that they ought to be severally indicted; and cited the case of *Rex v. Humphrey and Others (a)*, and *Brooke's Case (b)*.

S. C. 1. Salk.
382.
S. C. 2. Ld. Ray,
1248.
S. C. Ray. Ent.
61.

HOLT, Chief Justice. If it appear to be several offences, there ought to be several indictments.

POWELL, Justice. If two men commit a felony together, they may be jointly indicted.

HOLT, Chief Justice. So if men join in a battery, they may both be joined, though two several fines shall be set upon them; the like in an indictment of felony, but they shall severally have judgment. It appeared both these collectors received the money jointly.

Judgment was given against the defendants (c).

GOULD, Justice, said, had they not been guilty they would never have demurred, but have taken issue.

(a) 1. Vent. 302.

(b) 2. Roll. Abr. 81.

(c) *Rex v. Phillips*, 2. Stra. 921.

Rex v. Clenden, Stra. 876. *Rex v.*

Wellon, Stra. 623. *Reg. v. Dixon*,

Stiles, 312. *Rex v. Benfield and Saun-*

ders, 2. Burr. 980. *Rex v. Young and*

Others, 3. Term Rep. 98. and 4. Hawk.

P. C. 7th edit. 53, 54.

* [80]

The Queen against Belwood.

Case 130.

INDICTMENT.—The case was: A justice of peace had power to commit to ward, which is the word in the statute: the justice committed one to the * gaoler of the county.

The sheriff is liable for the escape of a prisoner committed

to the gaoler.—Ante, 61.

H 2

And

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THE QUEEN
against
BELWOOD.

And PER CURIAM, "The sheriff," and consequently his gaoler, is the proper officer; and if he let him go at large, it is such an offence as is proper for an indictment.

Case 131. The Queen against The Clerk of the Peace of Cumberland.

Quare, Whether articles exhibited against a clerk of the peace under 1. Will. & Mary, c. 21. charging him with "extortion, viz. that he exacted and forced from such person more than his just fees," are sufficiently certain.

CERTIORARI directed to the justices of Cumberland.

Articles in writing were exhibited to the court of sessions there against the clerk of the peace, charging him with several misdemeanors in the execution of his office, "viz. *inter alia*," that he exacted of several people, and forced them to pay more money than his just due and fee; and upon due consideration, and upon being heard by his Counsel, he was convicted and discharged of his office.

GOULD, Justice. This is a good conviction. THE FIRST QUESTION is, If this return be good in form? The crime is *extortion*, and so it is expressed full in one article; where there is a charge of extortion, it must be particularized. In the premises there is certainty enough;

But, Whether "viz." is sufficient? is the question.

The "viz." in this case connects the charge and the premises, and carries on the same matter. Sometimes a "viz." is absolutely void, as when it is repugnant to what goes before; but if it explain the matter precedent, it is good to serve the preceding purpose (a). It is sufficient for justices of the peace, who are not so skilful as lawyers, if they pursue the substance of the statute; and is not like the case of indictments (b), but rather like orders (c).—He held it to be certain enough.

The office of a clerk of the peace is a freehold.

ANOTHER QUESTION arose upon this office being a freehold; but then the statute 1. Will. & Mary, c. 21. creates this freehold (d), and also the jurisdiction of the justice of peace as to it (e). The words of the statute are, "If he shall misdemean himself, and upon examination thereof before them at their sessions, upon articles in writing, and upon a conviction, they may discharge him."

* [81]

* POWYS, Justice, was of the same opinion. By the statute 1. Will. & Mary, c. 21. this is a good order. When an act of parliament creates a freehold, and erects a judicature at the same

(a) 1. Saund. 169. 1. Vent. 107.

(b) See 6. Mod. 193. 1. Show. 282. Stra. 996.

(c) That the removal of a clerk of the peace under the statute 1 Will. & Mary, c. 21. is not a conviction but an order, see Rex v. Lloyd, Stra. 996. and that

the articles must be exhibited in writing, Rex v. Evans, 1. Show. 259.

(d) See the case of Harcourt v. Fox, 4. Mod. 167. 1. Show. 427. 506. 516. 536.

(e) See Bain's Case, 6. Mod. 192. S. C. 2. Salk. 680.

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time, it is subject to be defeated and destroyed according to the direction of the act; and is like the case of a fellow of a college, who may be removed by his visitor. The "*viz.*" incorporates the subsequent charge with the precedent general accusation: where the words "in the execution of his office" are omitted, then the "*viz.*" ought to say, that he committed the offence in the execution of his office. The word "that" would be nonsense, were it not for the "*viz.*" for the charge is, that he committed divers offences in the execution of his office, "*viz.* that he, &c." Even in indictments, he said, he had found two precedents strong to this purpose, *West Pref. sect. 97. of Vindicats*, and the same book, *sect. 130. 1. Sid. 91.* It was objected, that in the charge it is not said how much too much he had taken *colore officii* (a); but then he said, the justices had adjudged, that he had taken nine shillings too much, more than was his fee, *colore officii*. That being a court of judicature, they in open court debated the matter fully, and gave judgment; and this Court ought to judge favourably, that they have proceeded regularly.

THE QUEEN
against
THE CLERK
OF THE PEACE
OF
CUMBERLAND.

POWELL, *Justice, contra.* This removal and return is not sufficiently certain. This is a freehold, which the law requires great solemnity in removing the party from, and is much different from a chattel. My brother makes a difference, that this is a new freehold, but he could see no difference betwixt a new and an old freehold. It is true, this act of parliament has created a new way of trial; but he could not agree with POWYS, that a trial in this way was the properest, for a trial by a jury is the greatest check and security against arbitrary, &c. But the question is, Whether this removal pursues the authority in the act? In every charge there ought to be something particularly charged. If a man be indicted of divers misdemeanors in his office, "*viz. &c.*" I doubt whether it would be sufficiently certain. If a man be indicted for "feloniously stealing divers goods, *viz.* that he took a coat, &c." this indictment would not be good without the *felonice cepit et asportavit* to every one. * This ought to be construed as in indictments, especially since his freehold is concerned, and therefore it ought to be exactly certain. He said, in the charge it did not appear that what he took was more than his fee; and the adjudication will not help this defect, for they ought to judge upon the charge (b). He would in this case take all things strictly, and the act of parliament says "misdemeanors," but here is but only one single act and charge.

* [82]

HOLT, *Chief Justice.* This order ought to be quashed. He considered two things. FIRST, This charge ought to be certain, that in case of an appeal it may appear whether the matter they proceeded upon was sufficient in itself, and certain. This case did not differ from an information. Must a man lose his freehold because justices of peace are not skilful (or honest, as POWYS said)? The justices are not to draw the articles, but to judge of them; it

(a) See Bain's Case, 6. Mod. 193.

(b) Shaw v. Taylor, Hutton, 4.

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THE QUEEN is a common right due to every man not to lose his right, without
 against - sufficient certainty; it ought to appear to the Court to be a misde-
 THE CLERK meanor in the actual execution of his office, for it says the clerk
 OF THE PEACE did compel him to pay so much, but it does not say to him, nor
 OF CUMBERLAND, that it was "*calore officii, extorsivè, &c.*" Extortion is a specific
 offence, and is as necessary to be set forth as *felonice* in an indict-
 ment. Again, he said, he took ten shillings more than his fee;
 why, this may be, for perhaps he had another demand upon him.
 SECONDLY, It is the collection of the justices, by way of in-
 ference, that from the whole he is guilty; but that the justices
 cannot do, for here is no charge; but they have concluded from
 the premises, and not from the charge, for the charge does not
 affect him; for when it comes to the "*viz.*" there was no charge
 before.

Afterwards, upon looking into the statute, it appeared to be
 "misdemeanor" in the singular number (a).

But THE COURT remained still divided *ut supra*.

(a) The words of the statute are,
 "That the *custos rotulorum* shall from time
 "to time, where the office of clerk of
 "the peace shall be void, nominate and
 "appoint one able and sufficient person,
 "residing in the county, to execute the
 "same by himself or his sufficient de-
 "puty, and to take and receive the fees,
 "profits, and perquisites thereof for so
 "long time only as such clerk of the peace
 "shall well demean himself in his said office."
 AND, "THAT if any clerk of the peace
 "shall misdemean himself in the execu-
 "tion of the said office, and thereupon
 "a complaint and charge in writing
 "of such misdemeanor shall be exhibited
 "against him to the justices in their ge-
 "neral quarter sessions, it may be law-
 "ful for the said justices, or the major
 "part of them from time to time, upon
 "examination and due proof thereof,
 "openly in their said general quarter
 "sessions, to suspend or discharge him
 "from the said office."

TRINITY TERM,

The Fifth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt. } *Justices.*

Sir Henry Gould, Knt.

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* Willimot *against* The Chancellor of Worcester.

* [83]

Cafe 132.

PROHIBITION.—The case was : *Willimot* commits incest in *Worcester diocese*, and about two years after removed his habitation into the *diocese of York*; and coming to the election of parliament-men, this citation was served upon him in the *diocese of Worcester*. He appears by proxy, and pleads, that he lived in the *diocese of York*, and subject to the jurisdiction of *York*, *et nullo modo, &c.*

An inhabitant of *Yorkshire* excommunicated in *Worcester diocese*.

The plaintiff was excommunicated,

DR. FLOYD. It is the practice of their court to call the person personally to appear; for the citation was *pro salute animæ*, and that cannot be done by proxy or Counsel. No criminal can appear by proxy, neither ought he to have pleaded so contumacious a plea, but he ought to have made his appearance, with a saving to himself all benefit of exception; for *prima facie* there is a good jurisdiction to call him to answer, and then he ought to make protestation *de non consentiendo nisi de jure, &c.* The *Roman* senators had a privilege of being sued only in their superior courts; but if a senator had committed a base crime, he thereby had so debased himself, as that he should be subject to the jurisdiction he

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WILLIMOT
against
THE
CHANCELLOR
OF
WORCESTER.

* [84]

had offended. The statute of Citations extends not to criminal suits, but only betwixt party and party.

DR. LANE. The former practice to appear personally in criminal prosecutions, was founded upon the power the Court had to make him answer upon his oath, * which is now taken away by the statute. A man who removes his habitation, must not be said to run away from their jurisdiction. The pope, by his usurped authority, delegated to the *Archbishop of Canterbury* a power to cite a man out of his diocese, which by the statute is now gone.

HOLT, *Chief Justice*, said, this citation was originally wrong, it was against the statute; and granted a *prohibition*, that so they might plead to it, or demur; and so the point might be settled solemnly, being a case of great consequence.

Case 133.

Anonymous.

Special verdict
amended in a
criminal prosecution.

THE COURT were of opinion that the entry of a special verdict, though in a criminal prosecution (a), may be amended, if it was not entered according to the notes taken; and THE ROLL may be amended (b).

GOULD, *Justice*, cited *Raymond*, 460. and said, the Court frequently amended informations.

Quere, If the Court would amend in a case where they had not the minutes there.

PER CURIAM. If the notes and the verdict vary, the Court will amend according to the notes, else not.

PER CURIAM. If a jury find for *the queen*, and the verdict is entered for *the defendant*, yet at common law it is amendable (c); and it was agreed in *Dr. Drake's Case* (d), if in a special verdict the clerk take the minutes right, and the verdict be entered up wrong, the Court will amend THE ROLL according to the minutes, though in a criminal prosecution:

(a) In what cases amendments are excluded in criminal prosecutions; see 1. Com. Dig. "Amendment" (2. C. 1.).
2. Saund. 308.
(b) 4. Co. 52. 2. Roll. Abr. 701.
1. Roll. Rep. 82. Cro. Eliz. 112. 150.
1. Salk. 47. 53. See also Attorney Ge-

neral v. White, Bunb. 283. Newcomb v. Green; 2. Stra. 1197. 1. Wils. 31.
Cogan v. Ebdon, 1. Burr. 383. Ed-
dowes v. Hopkins, Dougl. 376. Taylor
v. White, Dougl. 746.
(c) Cro. Jac. 185. Yelv. 186.
(d) Post. 85. 95.

Anonymous.

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Anonymous.

Case 134.

IT is a singular favour to admit a defendant a pauper (a); but Paupers dis- if such defendant will plead a *dilatory plea*, the Court will dis- paupered. pauper him (b).

(a) See the statute 11. Hen. 7. c. 12. 311. Wilkinson v. Belshire, 2. Brown
Rex v. Wright, 2. Stra. 1041. Rex v. C. C. 273.
Morgan, 2. Stra. 1215. Langley v. (b) Anonymous, 1. Salk. 506. Win-
Blackerly, Andr. 306. Blood v. Lee, ter v. Slow, 2. Stra. 878. Taylor v.
3. Wils. 24. Rex v. Charles, 3. Burr. Law, 2. Stra. 983. Solomon v. Aynel,
1308. Gibson v. Macarty, Cases T. H. Fort. 320.

The Queen against Dr. Drake.

Case 135.

THE ATTORNEY-GENERAL took this difference, that this was If, in an infor- only a literal variation, and made nothing in the sense; and if mation for a li- this was to be allowed, no criminal would be punished: for sup- bel, the libel is- pose in the libel the word "*though*" was in the information wrote recited "ac- "*tho*," this would be the same objection. cording to the "*tenor* follow- ing," a va-

As to the objection of "*secundum tenor. * sequent.*" this is not riance of "*not*" is fatal. meant to be a *literal* setting forth, but a *substantial* one; as "ac- * [85] cording to THE TENOR of the deed" is according to the sub- S. C. ante, 78. stance of it: Even the setting forth "*in hæc verba*" must be only S. C. post. 95. in setting forth the substance. 5. Co. Long's Case, which he made S. C. 2. Salk. 660. use of to this purpose; that if such certainty was required, the S. C. 3. Salk. 224. effect would be only to confound all certainty, according to the S. C. Holt, 347. 425. rule there mentioned, *Nimia certitudo certitudinem confundit*. Sup- pose in a *certiorari* to remove a record, would any man say, if such a variance was, the record was not well removed? *Dyer, fo. 75.* Allen, fo. 30. Where in actions for words it is laid *in hæc verba*, *Dyer, 119. Roll. Rep. 422. 2. Roll. Abr. 717. 724. 7. Hen. 6. pl. 27. Telv. 46. Cro. Jac. 32. Styles, 344. 3. Co. 2.* these cases he offered to shew, that the law required substance and not form. If it had been a material variance, yet as this is laid it will be yet well; for the information is, that in that paper is contained divers scandalous and seditious matter; this matter in which the variance is, is not the matter complained of, for that was not a scandal; and the information is not for any thing in which there is no hurt.

BRANTHWAIT *contra*. If words have a doubtful signification, the Court will construe them in the best sense. The word "*nor*" is a different word from "*not*;" the latter being a direct negative; the former is only a word of relation, it refers to something else.

HOLT, Chief Justice. An information for a libel may set forth the libel in *Latin*; neither ought the whole to be set forth, but only that which is libellous in itself; and then at the trial, if it appears upon evidence that the words abstracted from the whole book

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THE QUEEN ^{against} **DR. DRAKE.** book are not libellous, the defendant must be acquitted. The words "*nor*" and "*not*" have a grammatical variation: he seemed to rely much upon the case of *The King v. Bear* (a).

Adjourned until next Term.

(a) 2. Salk. 417. 646. 3. Salk. 226. Carth. 407. 12. Mod. 218. Holt, 41. 1. Ld. Ray. 414.

* [86]

Case 136.

* The Queen *against* Dr. Brown.

Q. If exceptions can be taken in arrest of judgment of a misdemeanor, after the *four days* have elapsed and judgment *signed*. **A**N INFORMATION was brought to have judgment for a libel, called, "The Country Parson's Advice to my Lord Keeper."

The judgment was regularly signed, but the defendant did not move in arrest of judgment within the *four days* (a).

THE COURT doubted whether they could hear Counsel, this being in a criminal cause, and ordered Counsel to speak to this point.

But **THE ATTORNEY-GENERAL** afterwards consented they should take their exceptions.

Irony, used with a libellous intent, may become the subject of criminal prosecution. **BRANTHWAIT** excepted, that this did not import a scandal, but, in their natural signification, carry a credit, as "to be wife as *Somerfet, &c.*" Suppose an indictment for a nuisance which in itself is so, it is enough to say so generally; but if it be only a nuisance as it is accompanied with circumstances, there it ought to be particularly set out; as for building an inn; or for building an inn *ad commune nocumentum* is not good, &c. 2. *Roll. Rep.* 345.

Hob. 215.
Poph. 139.
2. Hawk. P. C.
ch. 73. f. 4.
Stra. 422.

So here the manner of speaking ought to be set out.

HOLT, Chief Justice. An information will lie for speaking *ironically*.

And **MR. ATTORNEY** said, it was laid to be wrote *ironicè*, and he ought to have shewed at the trial that he did not intend to scandalize them; and the jury are judges *quo animo* this was done, and they have found the ill intent.

Judgment of the pillory, and fine of forty marks.

(a) See *Algernon Sidney's Case*, 3. St. Tr. 820. *Rex v. Thomas Rosewell*, 3. St. Tr. 1050. *Rex v. Richard Knightly*, 4. St. Tr. 779. Lord Grey's Case, 3. St. Tr. 543. *Rex v. Opie and Dodge*, 1. Saund. 301. *Rex v. Morris*, 2. Burr. 1189. *Rex v. Daniel Holt*, 5. Term Rep. 436.

Case 137.

Lord Kingfale *against* Compton.

Venire tested by award, before issue joined. **R**ECORD of *Trinity Term*, an award upon **THE ROLL** to try the issue returnable such a day; error, that *the venire* bore *teste* before issue joined,

Where

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Where the award upon the roll is wrong, the *statute of Jeofails* will not extend to it.

POWELL, *Justice*. The *statutes of Jeofails* will not help the erroneous award of the Court.

This was a writ of error, and the error assigned was, that the record was of *Trinity Term*, the *venire* was awarded * returnable *Craftino Trin.* which was before the Term; now this being a wrong award of the Court, it must be intended returnable the year after, which is an erroneous award of the Court, and then there is nothing to award the writ by, the roll being wrong.

THE COURT seemed to be of opinion, that this was error, and not helped by the *statutes of Jeofails*.

Sed adjournatur,

LORD
KINGSALE
against
COMPTON.

* [87]

Sir Charles Thorold *against* Smith.

Case 138.

DARNELL, *Serjeant*. A receipt shall not be a good discharge, where a servant had not a special authority to give a receipt (a). Suppose a servant give a receipt, and do not receive the money, shall this bind the master? so if he take any collateral security, as a bond.

If a creditor send his servant to receive money from a debtor, and the servant receive a banker's check, and keep it an unreasonable time until the banker fails; *Quære*, Whether this is payment to the master? S. C. ante, 71. S. C. Holt, 462.

MR. EYRES. The question is, If a servant is sent by his master for money, and receive anything else in lieu of money, whether this is a pursuance of his authority? It did not appear in this case, that *Sir Charles Thorold* had any notice of the receipt of the bills, nor of *Johnson's* breaking; but the servant sent the note back upon hearing of *Johnson's* breaking. A servant sent by his master to receive money, cannot release or discharge his master's debt without receiving the money; for a receiver has no power to make any commutation without a special authority (b).

SIR JAMES MOUNTAGUE *contra*. The authorities cited from the old books (c) will not weigh much in this case; for the way of trade and commerce is of a quite different nature now.

HOLT, *Chief Justice*. A bill of exchange or goldsmith's note is not payment (d), unless the party omits receiving of it in a reasonable time, as *three days*, when he might have received it (e); but if he give a receipt and accept the note as payment, this shall bind

(a) Year-Book 10. Hen. 7. pl. 9. 4. Hen. 6. pl. 1. 40. Affize, 38.

(b) Doctor and Student, 138. b.

(c) Vide supra note (a).

(d) See *Russell v. Hankey*, 6. Term Rep. 12.

(e) See *Moor v. Warren*, 1. Stra. 415. *Turner v. Mead*, 1. Stra. 416. *Manwaring v. Harrison*, 1. Stra. 509. *Hayward v. Bank of England*, 1. Stra. 559.

Pepys v. Sir John Lambert, 1. Stra. 707. *East India Company v. Chitty*, 2. Stra. 1175. *Fletcher v. Sandys*, 2. Stra. 1248. *Tassell v. Lee*, 1. Ld. Ray. 744. *Ap-pleton v. Sweetapple*, Bayley on Bills, 32. 34. *Ward v. Evans*, Ld. Ray. 928. *Hill v. Lewis*, 1. Salk. 32. *Hankey v. Trotman*, 1. Black. Rep. 1. *Metcalf v. Hall*, Beaves L. M. 482. *Chamberlain v. De La Rive*, 2. Will. 353.

him,

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SIR CHARLES
THOROLD
against
SMITH.

* [88]

him. In this case *Sir Charles* himself gave no receipt, but the servant. Where a man has authority to receive money, he cannot receive anything else. It is common practice, if a man receive a * *goldsmith's note*, and give a receipt, it is purchasing the bill. In this case, it must be understood according to the course of the world and trade, that this servant had a *general authority* to do what his master would have done; this case differs much from the case of a servant or attorney to one particular purpose, but this is in nature of a factor, &c.

POWELL, *Justice*. No modern practice will alter the old law. The party himself may give a receipt, but a general receiver cannot receive any thing else. His own acquittance would stop him, but his servant's receipt will not. In this case the servant was sent to receive *money*: This servant, he supposed, had many times received *bills* for his master, and this is an authority to this purpose; but this indeed was proper matter of evidence, being the constant practice of the world; and had this not been, *Sir Charles* would have asked his servant what he had done; and when he had told him he had received such a note, it is a strong presumption his master approved of it, or else, it is to be presumed, he would have sent it back again.

Adjournatur.

HOLT, *Chief Justice*, thought this was more matter of evidence than law; and any jury at *Guildhall* would find payment by a bill to be a good payment, it being the common practice of the city. And he proposed a *new trial*, whether the servant had power to receive a bill, and give a receipt; which was agreed to.

HOLT, *Chief Justice*. In this case, the receipt of a servant that has power, is the receipt of the master.

Case 139.

Andrews against Strowd.

Settlement to husband and wife for life, remainder to trustees for years.

S. C. Holt, 623.
S. C. 1. Bro.
P. C. 143.
S. C. 10. Viner, 225.

THE CASE was this: A settlement was made to husband and wife for life, and if he die without issue male living, or in *ventre sa mere* at the time of his death, remainder to trustees for five hundred years to raise daughters portions.

The husband died, leaving issue male at the time of his death; which issue male soon after died without issue male; and the wife died:

* [89] THE QUESTION was, Whether this term should rise up again for the benefit of the * daughters?

S. C. 16. Viner, 453.
1. Sid. 102.
1. Lev. 23. 35.
1. Vern. 299.

The opinion and judgment of THE COURT was, that it should not, it being a *condition precedent*, and not a *remainder* upon the determination of the estate-tail (a).

(a) Goodier v. Clark, 1. Lev. 23.

This

Trinity Term, 5. Queen Anne, In B. R.

This judgment was reversed in the house of lords, upon the reasoning that Mr. RAYMOND urged (a), viz. that the time of his death related only to the *ventre sa mere*; and then it was no more than a usual limitation; for the wife was not *enceinte*.

ANDREWS
against
STROWB.

(a) See the substance of the arguments 1. Bro. P. C. 146.

Anonymous.

Case 140.

RAYMOND objected, that this Court could not reverse a judgment given in another court, unless they could give the same judgment the other court should have given; which in this case cannot be, because the plaintiff in the original action was dead, and the Court cannot give judgment for a dead man. He, as executor, might have an action for *bonis asportatis in vita testatoris*, but that is by the statute *Edward the Third*.

Quare, If B. R. can give judgment where the inferior court could not.

HOLT, *Chief Justice*. If this Court cannot give the same judgment as the court below should have given, it is because the suit by the death of the plaintiff there is abated: but this Court will reverse the judgment, which otherwise would be a perpetual bar; and by the reversal the executor is restored to his action.

Anonymous.

Case 141.

PER CURIAM. If a man's estate is of such a nature, as that the commissioners cannot assess a certain tax upon every man, as in the case of common, &c. they ought not to meddle with it.

Commissioners of taxes. Post, 206.

Anonymous.

Case 142.

WHERE the plaintiff in error is *non-suited*, or where the judgment is affirmed, or a discontinuance, there costs shall be allowed (a), but no costs where he is barred. 2.

Costs on discontinuance, &c.

(a) By the express words of the statutes 3. Hen. 7. c. 10. and 8. & 9. Will. 3. c. 11. and by 13. Car. 2. c. 2. f. 10. such plaintiff in error shall pay double costs on the judgment being affirmed. See HULLOCK on Costs, 280 to 296.

Henly against Welch.

Case 143.

TRESPASS FOR HIS HORSE. The defendant pleaded, that one Pooley was owner of the horse, and that the horse strayed out of his possession and came to the hands of the plaintiff; and that he, by the command of Pooley, demanded the horse within a year, &c. and tendered amends, and that the plaintiff refusing to deliver him, he took him. To this there was a frivolous replication, and upon that a demurrer (a).

Tender of amends for keeping an estray, &c.

S. C. Salk. 686. S. C. Holt, 563.

(a) The foregoing part of this case is inserted from Same Case, Salk. 686.

HOLT,

Trinity Term, 5. Queen Anne, In B. R.

HENLY
against
WELCH.

* [90]

HOLT, *Chief Justice*, cited these cases to shew, that in case of an estray, the lord ought to make a demand of what the amends ought to be for the keeping; and then, if the party think the demand unreasonable, he * ought to tender sufficient amends; but if he tender insufficient amends, the lord ought to take issue, and let the jury settle what the keeping is worth. *Noy*, 144. *Godb.* 150.

NOTE, In this case the action was brought for an estray colt; and by the replication it appeared, that it was after the year, and then it ceased to be an estray, and became the lord's property.

HOLT, *Chief Justice*. It became an estray after the first proclamation, and not sooner; the owner is subject to pay for no more than a year's keeping, which shall commence from the seizure.

POWELL, *Justice*. The pleading a tender of sufficient amends is well, and a good issue.

This case (a) was argued again.

EYRE, *for the plaintiff*, argued, that the plea was not good, because the certainty of the sum tendered is not set forth, nor is there any refusal; for the refusal is of the gelding; but it is not said that he refused the money, and all the precedents of tenders are of a sum certain; and the book cited of 44. *Edw.* 3. c. 14. is not against me, for that is no more than the issue may be taken on the sufficiency of the amends.

SQUIBB, *for the defendant*, argued, that the tender for sufficient amends was well enough, and that proper issue was the sufficiency of the amends; and if not, it was but a default in form, which is aided by a general demurrer; as if I plead myself to be cousin and heir, and do not shew how, this is bad on special demurrer; but if you demur generally, it is aided, and the Court did hold, that tendering sufficient amends is enough, ascertaining the same; and the proper issue is sufficient, or not sufficient.

And HOLT, *Chief Justice*, said, it was never necessary to plead in certain the sum tendered, unless the lord demands too much; for when the lord demands so much, then the owner shall tender so much, and which of them is sufficient, to the jury is a question: but the owner must in such case set forth a sum certain; for though the lord demands too much, yet he may keep the estray until the owner does tender sufficient amends. 1. *Roll.* 879. 5. by TANFIELD, *Chief Justice*. But in this case the plaintiff's replication does destroy his action; because first he brings trespass for his taking an estray, and then in his replication he does not set forth that he did proclaim him; and it does also there appear, that it was more than a year and a day after the taking him as an estray, that the defendant, as owner, took him away; now after the year and the day, the lord had the absolute property in him, which is

(a) The following part of this case is taken from Holt's Report of same case, 564.
much

Trinity Term, 5. Queen Anne, In B. R.

much greater property than a lord has in an estray; and if you do first declare for him as an estray, and in your replication shew the property was absolute in you, that is bad; then if you do not shew that this estray was proclaimed the next market-day after the same was found, at the next market-town, you have no property in the estray, and so your action fails therein also; for you must, to justify yourself, shew that you did what the law required of you to give you this title.

HENLY
ag. J.B.
WELCH

To which POWELL, *Justice*, agreed.

HOLT, *Chief Justice*. If the owner of an estray comes to the lord and demands his beast, the lord is not obliged to give it him immediately, until he is satisfied by the owner's description of the marks, that he is the owner's, and when he is satisfied therein, then it is proper for the lord to make his demand; and if it be the owner's, he is to tender a sum certain; and so it must be pleaded, but it is not necessary in this case. The owner of an estray cannot reasonably know what amends are sufficient, for which reason the lord is to make his demand; but where cattle are taken *damage-feasant*, the owner is at his peril to know what damage the cattle have done, and is to make a tender of sufficient amends; and he that does take the cattle in such case need not make any demand.

So in this case, for all these reasons, THE COURT gave judgment for the defendant.

Smith against Tindal.

Case 144.

WELD, *Serjeant*. The question arose upon a devise to one "of all his lands and hereditaments." It is true, the intent of the party shall be supported if possible; as "*John a Stiles* shall be my heir," this carries a plain intent that the devisee shall stand *in loco* of the heir. So a devise to one "for ever;" and this is agreeable to the law, for a release of "all his estate" will extinguish the right. The word "hereditament" is a common word, and it is here accompanied with other words; it is a word frequently inserted in conveyances; even in a lease for years; nay, it is so commonly put into leases, that people scarce think it safe without it. Now the intent of the devisor does nowhere appear to carry the *interest*, nor will this word bear such a construction. It is true, the word "*hereditas*" implies the *interest*, but the word "hereditament" is the thing itself, *viz.* the land (a). The word "hereditament" signifies not only what a man has by descent, but also what he has by purchase. If a man has only an estate for life, if he give "all his hereditaments for years," why this will pass (b).

A devise of "all my lands, tenements and hereditaments to my wife and her assigns," re-serving so much a-year to be distributed to the poor of the parish for ever, passes an estate in fee, by reason of the perpetual charge, and not by operation of the word "hereditaments." S. C. post. 102.

S. C. 2. Salk. 685. S. C. Holt, 235. S. C. 2. Eq. Ab. 300.

(a) Spelman's Glossary, 203.

S. C. Moor, 873. Brown v. Waite,

(b) Wedlake v. Harding, Hob. 2. 1. Vent. 299.

If

Trinity Term, 5. Queen Anne, In B. R.

SMITH
against
TINDAL.

* [91]

If a tenant for life of lands levy a fine with warranty, the warranty descends upon him in reversion (a). Nobody will say, but if tenant for life levy a fine, he in reversion might have entered for the forfeiture. Where a warranty extinguishes a right, a release of that warranty will set it up again. The pleading a rebutter * shews it does not give a right; for the conclusion is not judgment *si alio*, but is by estoppel (b). If a man covenant to make further conveyance, a man is not bound to convey with warranty, because it is no conveyance, but only a bar (c). No doubt a warranty, so long as it accompanies the land, is a good defence.

MR. GILBERT. As to the objection arising from the word "hereditament" being mingled with other words, "lands and tenements," the Court will not intend, when people are conveying their rights; that words are used for tautology (d). The statute of Limitations cannot be given in evidence, where THE MISE is joined upon the mere right.

HOLT, Chief Justice. The word "hereditament" signifies the land in which I have an estate of inheritance. If a man lease "all his hereditaments in D." this will carry all whereof he has an inheritance; and all freeholds; &c. (e).

POWELL, Justice. "Hereditament" describes the thing of which an estate of inheritance may be; and carries that which lands or tenements will not do; &c. as common, &c. And the pleading is, *quod clamat ut jus et hereditament. suum* (f). He said, that he did not go upon the word "hereditament," but the word "interest." In this case, he said, the perpetual charge went a great way to carry a fee (g); and the personal estate will not be liable, but the charge shall rise out of the land; which is permanent.

(a) See same case, post. 102. 2. Salk. 685. Holt; 235.

(b) Fitz. Abr. "Droit" 29.

(c) Maccott v. Denne, 1. Roll. Rep. 71. Lascelles v. Chatterton, Rayn. 190.

(d) 1. Roll. Abr. 834.

(e) It is now settled, that the word "hereditament" will not pass a fee. Hopewell v. Ackland, Salk. 239. Canning v. Canning, Moseley, 240. Pal-

mer v. Richards, 3. Term Rep. 356. Moor v. Miller, 5. Term Rep. 558.

(f) See Brown v. Wiatt, 1. Vent. 299.

(g) See Baddelly v. Leppingwell, 3. Burr. 1533. Frogmorton v. Halliday, 3. Burr. 1618. Doe v. Richards, 3. Term Rep. 356. Goodright v. Stocker, 5. Term Rep. 13. Moot v. Miller, 5. Term Rep. 558.

Case 145.

Feoffment with
warranty.

Anonymous.

HOLT, Chief Justice. A father tenant for life, remainder to his wife, remainder to his first son in tail; the son is at age, the father makes a feoffment in fee with warranty, and takes back an estate to him and his wife; the husband dies, the wife is remitted, but the collateral warranty binds the son, for he is not remitted. See the case of *Heywood v. Smith* (a).

(a) 1. Bull. 165.

Anonymous.

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Anonymous.

Case 146.

HOLT, Chief Justice. If a legacy be given, or a sum of money in gross devised out of lands, he doubted not but an action of debt might be brought for that money; though such action never as yet had been brought; and he *doubted not but that it might be brought upon the statute of 32. Hen. 8. c. 1. For whenever a statute gives a right, it must by necessary consequence give a remedy; and the proper remedy in such case is *debt*, which may be founded on that statute (a).

Debt for money devised as a legacy.

* [92]
6. Mod. 27.
Salk. 415.
2. Show. 36.
1. Ch. Cases, 57.
257.
1. Ch. Rep. 134.
2. Ld. Ray. 937.

(a) See Trevanion v. Howell, Cro. Eliz. 91. Keech v. Kenegall, 1. Vezey, 125. Anonymous, 6. Mod. 27. Hawkes v. Saunders, Cowp. 291. Atkins and his Wife v. Hill, Cowp. 284. Lewis v. Lewis, 1. H. Bl. Rep. 111. *notis.*—But in the case of Rose v. Bowler, 1. H. Bl. Rep. 113. and Deeks v. Strutt, 5. Term

Rep. 690. it is determined that an action at law will not now lie for *alegacy*; but that application on this subject must be to the court of chancery. See also Brown v. Elton, 3. Peer. Wms. 202. Harrison v. Buckle, 1. Stra. 239. Farish v. Wilson, Peake's Nisi Prius, 73.

Anonymous.

Case 147.

POWELL, Justice. If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring *debt* or *account*; and cited four or five cases.

Debt or account for money delivered to buy goods. 2.

HOLT, Chief Justice, contra. If the party did not take it as a debt, but *ad computandum*, or *ad merchandizandum*, it must be an account, and he shall have the benefit of an accountant; which is, he may plead being robbed (a), which shall be a good plea in the last case, and not in the first.

Adjourned.

(a) See the case of Vere v. Smith, 2. Lev. 5. S. C. 1. Vent. 121. S. C. 2. Keb. 761. 779. 830.

Anonymous.

Case 148.

PER CURIAM. Although a cause has proceeded no farther than *in paper*, yet if the time be out for the entering it up upon the record, this Court will not give leave, upon motion, to amend the declaration upon paying costs. Let them declare *de novo*.

Declaration not amendable on payment of costs.

Buckley against Cambell (a).

Case 149.

AN assumpsit was brought on a foreign bill of exchange, to pay according to the custom of merchants so much money, at two to be shewn in *usances*, viz. at *Amsterdam*; but it did not appear what the time of those *usances* was.

Foreign usances to be shewn in the declaration.

S. C. 1. Salk.

HOLT, Chief Justice, said, he would take notice of the custom of merchants here, but not of that at *Amsterdam* or *Venice*, &c. In such case, you must set forth the custom in your declaration.

131.
Kyd on Bills, 122.
Bailey on Bills,

(a) It appears that this case was in Hilary Term, 7. Ann. S. C. 1. Salk. 131. 54.

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MICHAEMAS TERM,

The Fifth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* *Hacket against Tilly.*

DEBT UPON A BOND conditioned to save harmless against any actions brought for any escapes.

A difference was taken between a general condition, and a condition only to save harmless against escapes suffered by the party himself: and then a construction of words shall be according to the intent of the parties. 1. *Lev.* 63. *Yelv.* 197. *Hob.* 14. *Dyer*, 306. *Owen*, 100. *Dyer*, 17. A condition (a) shall be intended for the benefit of the obligor, and is in the nature of a defeasance; *aliter* if the bond had been single.

HOLT, Chief Justice. A bond to save a man harmless from an unlawful act already done is not void, but is an undertaking to bring him off. There is a difference between saving a man harmless from an action, and a judgment; for in saving him harmless from an action, he must take care that it does not go to judgment; for then it is no longer an action (b).

(a) For construction of conditions, see *Hob.* 304. *Hut.* 40. 18. *Edw.* 4. 28. 1. *Roll. Abr.* 417. A bond conditioned to commit maintenance is void. 1. *Leo.* 107. *Moor*, 186. 10. *Co.* 101.

Note to former edition.

(b) *Sed quare*, If not the necessary consequence of an action? and so within the condition.—*NOTE to former edition.*

* [93]

Case 150.

Bond to save harmless against escapes.

S. C. Lilly Ent. 160.

S. C. Holt, 201.

S. C. 2. Ld. Ray. 1207.

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HACKETT
against
TILLY.

* [94]

POWELL, *Justice*. If a gaoler take a bond from a servant, to save him harmless from all escapes to be suffered by the servant, it is good. A condition may be good for part, and void for part; but a * condition against a statute, if it is void in part, is void in the whole. See the *stat. 23. Hen. 6. c. 10. 10. Co. 101. 11. Co. 53.*

Case 151.

Lord Banbury's Case.

Misnomer avoids
both judgment
and execution.

MOTION to set aside a judgment irregularly entered up, and to set aside the execution thereon.

S. C. 2. Ld. Ray.
1247.

S. C. Salk. 47.
509.

S. C. 3. Salk.
242.

1. Salk. 3.

7. Mod. 38.

Str. 985.

CHARLES *Earl of Banbury* gave a warrant of attorney to enter up judgment by that name, but the plaintiff entered it up by the name of *Charles Knowles, Esq.* It appeared that the bond was by the name of *CHARLES Earl of Banbury, &c.*

THE COURT set it aside; but said, that if a nobleman will admit himself to have a wrong name, so that it cannot appear to the Court that he is a *peer*, he shall not after say he is a peer, and so alter the nature of the execution (a).

(a) See *Lord Lonsdale v. Littledale*, 2. H. Bl. Rep. 299.

Case 152.

Anonymous.

In what cases
copyholders shall
forfeit their
estates.
Ante, 68.

MR. SALKELD cited the following cases, as to copyholders forfeiting their estates by exceeding their authority; as for a tenant for life trespassing upon the inheritance, by cutting timber. *Lord Rich v. Makepeice* (a), *Hoskins v. Robbins* (b), *Brink v. Beare* (c), *Rockey v. Huggins* (d), *Paston v. Utber* (e). He compared the case of a copyholder to the case of tenant at will; viz. that which could be a determination of the will at common law, is a forfeiture of his copyhold (f).

MR. EYRE. If a tenant for life lay a custom for all windfalls of timber, this is a void custom, being a greater than belongs to his estate; for it is a custom to take away that right from the lord which the law gives him, without any particular reason to enlarge his privilege further than the nature of his estate allowed (g). A custom for a *feme-covert* to devise is void, for that she has no property (h). Where a custom is for the benefit of the estate,

(a) Noy, 29.

(b) 1. Vent. 123. 163. S. C. 2. Lev. 2.
S. C. 1. Mod. 74. S. C. 2. Saund. 324.
S. C. 2. Keb. 757. 842. S. C. Pollex-
fen, 13.

(c) 1. Bulst. 51.

(d) W. Jones, 245. S. C. Cro. Car.
220.

(e) Hutton, 102. S. C. Lit. Rep.

264. S. C. Hetley, 5. S. C. Wind.
Ent. 432.—See also *Peachy v. Duke of
Somerset*, Str. 447.

(f) See *Burr. Rep.* 1543. and *Good-
win v. Spray*, 2. Term Rep. 474.

(g) *Moor*, 8. *Fitz. Abr.* "Devil"
12.

(h) 1. Sid. 161. *Winch*, 8.

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there a custom to charge it may be good; because of the consideration of the benefit. Their being blown down by tempest, without the default of the servant, shall excuse him from a forfeiture of his estate; but why for this shall the lord * lose his property; for before they were blown down the property was in the lord, &c. (a). This is a privilege too great for the estate of the copyholder for life, and so a void custom.

ANONYMOUS.

* [95]

MR. KING. It is not unreasonable, that at the original grant there might be a special agreement between lord and tenant, that he should not be liable to be entered upon when any such accident happened; and in consideration thereof, he might possibly promise to plant young trees, or do some other act, &c.

HOLT, *Chief Justice*. It is agreed, that a copyholder has a possessory property, and when his possession is gone, his property is gone; now shall the severance transfer the property, &c.

POWELL, *Justice*. Suppose a custom, that if the house fall, the materials should be the tenant's, could that be good? Again, shall the act of God do a wrong to the lord? Frank-bank was to encourage the tenant to go into the wars; if they were killed, the lord would not take the benefit, but gave the estate to the wife, to encourage them to fight; and this POWELL, *Justice*, thought was the original of frank-bank.

(a) Godb. 234.

The Queen against Dr. Drake.

Case 153.

GOULD, *Justice*, as to the FIRST POINT, viz. Whether this be a libel? was of opinion that the words are a libel.

If, in an information for a libel, the libel is recited "according to the tenor following," a variance of "not" instead of "nor" is fatal; for the words have a different grammatical signification.

SECOND POINT, viz. Whether there be such a variance between "not" and "nor," as to make it a material variance? This is the case of a libel founded upon a writing, and not like the cases of words; for there it is sufficient to find the words to be actionable (a). The words are materially different, for the one is a negative copulative, and the other has a different sense. There is a difference between an action founded upon a deed, as debt upon a bond; there, if there be a variance, one may plead *non est factum*; not so here. So he concluded that judgment ought to be for the defendant.

POWELL, *Justice*. It is a libel, and a very virulent one. As to this variance it is a mere slip, but it is such a one as will occasion a judgment for the defendant. "Not" may begin a sentence, * but "nor" cannot; it is a relative, and of another part of speech. If the Court was not to stop at a word, where would be the *plus ultra* (b)? It is objected, that in declarations for words, you lay "in hæc verba Anglicana sequent. viz." which is as strict as

S. C. ante, 78.84.
S. C. 2. Salk. 660.
S. C. 3. Salk. 224.
S. C. Holt, 347.
425.

* [96]

(a) Register, 169. Cro. Jac. 407. (b) Hob. 179. Yelv. 46. Cro. Jac. Dyer, 75.

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THE QUEEN
against
DR. DRAKE.

"*secundum tenor. sequent.*" I answer, words are *quasi* in the air, but *literæ scriptæ manent*. Again, in an action *the scandal* is the matter; here, *the writing*, &c. (a). The word "*tenor*" is by constant usage become a law term; and is to be an *exact copy*, according to the case of *The King v. Bear* (b). -

Note.

POWYS, *Justice*. The consequence might be ill, in giving a loose in such cases as these, though the difference seems small and trifling; for if Judges have such a power, it may be carried to cases of treason, and endanger mens lives by inferences. The Books are full of the learning of variance material and immaterial; but you do not count there upon THE TENOR, but upon the record in general, as in words, &c. *Ad effectum* is not good. In law there cannot be A TENOR of words; for there is no original to compare the tenor by; for the words remain only in the idea of the mind (c). If the tenor be a copy, which must be intended a true copy, then how can the tenor admit of a variance, be it material or immaterial? A man may declare for more, but if the jury find the very words that are actionable it is good (d). He thought the case of *Sir John Sidenham* (e) a little shaken. In *Charles the Second's* time there was an act, that to say "the king was a papist," a *præmunire* should be incurred: Suppose a man had been indicted, and a jury found, that he said he "believed the king to be a papist," he could not have been found guilty; for to say "I believe a man a papist," is not so much as to affirm him to be one; for the latter implies a knowledge of his own. He thought it not proper to extend cases of this kind, for fear of the dangerous consequences; and that judgment should be for the defendant.

* [97]

HOLT, *Chief Justice*. The question is, Whether this is such a variance from the information as to make him *not guilty*, &c. It is such a variance. FIRST, If a libel be set forth in these *English words*, a variance spoils the whole information. SECONDLY, "the tenor" is the same as if it had said, "*in hiis Anglicanis verbis* (f)." If it had been in *Latin* it had been good, because the matter and substance is described in the form in that case; but in this case it is distinguished from any other matter and thing, by the description and by the words "*secundum tenorem sequent.*" There is no difference betwixt transient actions founded on wrong, and words; for words are an injury. Suppose the jury had found no title to the libel, whereas the attorney had set it forth and de-

(a) Cro. Car. 328. 11. Co. 131.

(b) 2. Salk. 417. 646. 3. Salk. 226. Carth. 407. 12. Mod. 218. Holt, 42. 1. Ld. Ray. 414.

(c) Year-Book 7. Hen. 6. pl. 18. and 19.

(d) Thus in an action by *Sir John Burges* for these words spoken by *Warrenford*, "There is a great nest of thieves at *Pisson*, and *Sir John Burges* is the

"maintainer of thieves; and he is a *strong thief* himself;" the jury found, that he spoke all the words except the word "*strong*," and the verdict was held good. *Dyer*, 76. See also the case of *Companion v. Martin*, 2. Bl. Rep. 791. and Bull. N. P. 5.

(e) Cro. Eliz. 503.

(f) 5. Co. 53. 2. Saund. 121.

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scribed it with a title, it had been naught (a). What rule shall the Court be guided by? It is true, the difference is trifling, but where shall we stop, if we begin to allow of any variations in such cases?

THE QUEEN
against
DR. DRAKE.

NOTE, 2. Cro. 32. Yelv. 152. were cited for declarations in words for more than is found.

Judgment was given for the defendant, but a writ of error intended (b).

(a) See Sir Edward Walgrave's Case, Rex v. May, Dougl. 194. Rex v. Pett, 1. Term Rep. 235. Rex v. Hart, Dyer, 203. a.
(b) See Rex v. Beach, Cowp. 229. Cases in Crown Law, 131.

The Queen against Smith.

Case 154.

THE DEFENDANT was in execution in NEWGATE, at the suit of the queen, upon an extent.

The queen's debtor in Newgate, turned over to the marshal.
Burr. 1876.

It was moved, that this Court would grant a *habeas corpus* to bring him here, that the bail might discharge themselves;

But this motion was strenuously opposed by THE ATTORNEY GENERAL, for that the queen by her prerogative should have the election of her gaol; and if he came here, it was only in order to be turned over to THE MARSHAL, which he insisted on the Court could not do:

But THE COURT seemed inclinable to give the bail an opportunity to surrender him, and to commit him to THE MARSHAL, as well for the queen as the party. 1. Cro. 389. Dyer, 297.

And accordingly THE COURT did turn him over for this, and for all other actions for which the plaintiff might declare against him in this court (a).

(a) See the statute 25. Edw. 3. c. 13. case of the Bail of Boife and Sellers, Peter Vergen's Case, 2. Stra. 1217. 1. Stra. 640. French's Case, Salk. 353. Bond v. Isaac, 1. Burr. 339. Fowler Chitty's Case, 1. Wilf. 248. See also v. Dean, 4. Burr. 2034. Dr. Bettis Sellon's Practice, 180. Tidd's Practice, worth v. Potts, 3. Burr. 1876. The 148, 149.

* [98]

* Brown against Dyer.

Case 155.

EJECTMENT. Dyer being seised in fee according to the custom, which is for lands to descend to the younger son, and the wife to have an estate during her life, the father had issue a son by one venter, and another by another venter; the father dies; the wife enters, and then the youngest son dies without issue.

Customary descent to the younger son.
Q. If the wife's estate for life shall break the descent to the elder.
S. C. ante, 70.
S. C. post. 107.
S. C. Holt, 165.

The first question was, Whether the intermediate estate of the wife so broke the descent from the younger son, as to make the elder son of the half blood to the younger incapable of inheriting?

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BROWN
against
DYER.

RAYMOND. This is no more than if the younger son had never been born; and the elder shall make his title from his father, without taking notice of the brother (a). Where a custom does not provide for collateral matters, it shall be guided by common law (b). The estate of the wife is a continuance of the estate of the husband, as in the case of *Newton v. Shastoe* (c); and if that case in *Levinz* be law, it is this very case: and in this case, there is no title found for the defendant, then the possession is a right against all except him that has the mere right.

EYRES *contra*. It is true, the possession is found in the plaintiff, but that was not intended to be insisted on, but the very title: besides in this case the Court will allow of an amendment.

But then HOLT, *Chief Justice*, said, You must go before the Judge who tried the cause.

Two things ought to be found; the ancestor's dying seised, and that this was the youngest son.

HOLT, *Chief Justice*. Suppose he has but one son, then he shall take by the common law. The ancestor must die seised, and there must be a younger son; and should the ancestor be disseised, and die, the right would descend to the eldest. Whenever a right of inheritance is vested, the defendants shall take *jure representationis* (d). In this case the father surrendered in tail, and the heir was admitted generally in fee; but this admittance shall relate to the surrender which bound the land (e). * The heir is a complete copyholder before admittance; and his possession will make a *possessione fratris*.

* [99]

RAYMOND. Perhaps the Minute-Book may warrant the amendment. Where the custom is not express, there the common law shall guide; and there, if there is but one son, the common law shall have the preference, and he shall take by it; which is an establishment of this assertion, that collateral matters shall be guided by the common law.

HOLT, *Chief Justice*. If a man surrender his estate to the use of himself in tail, and die, the heir has two rights in him, either to be admitted in fee or in tail.

POWELL, *Justice*. This customary estate for life he compared to the case of the freehold, which hindered the descent of the demesne and freehold.

And THE COURT seemed to incline strongly to construe the descent according to the common law.

(a) *Reeve v. Maltster*, Cro. Car. 410.
S. C. W. Jones, 631. S. C. 1. Roll.
Abr. 614 624.

(b) 1. And. 31.

(c) 1. Lev. 172. S. C. 1. Sid. 267.

(d) 1. Roll. Abr. 623.

(e) He cited *Moor*, 29. 1. Roll. Abr.
504. Cro. Jac. 100. Co. Lit. 39.
4. Co. 22. 25. 28. 2. Roll. 383.

HOLT,

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HOLT, *Chief Justice*. If the father be disseised and die; in *Burrough English*, the right is in the youngest son; yet at least the heir shall enter, and then the younger son shall re-enter. If a rent-charge be granted *de novo* out of land in *Kent* or *Burrough English*, the rent shall descend according to the land.

Adjournatur.

BROWN
against
DYER.

Anonymous.

Case 156.

AN ACTION UPON THE CASE was brought for dispersing a paper, accusing a gentleman of saying, "HE could see no probability of the war's ending with *France*, until the little gentleman (a) on the other side the water was restored to his right," innuendo "the *Prince of Wales*."

An action for a libel, stating that the defendant dispersed a paper writing, accusing the plaintiff with having said that the war would not end "until the little gentleman, IN-NUENDO the *Prince of Wales*, was restored," is sufficiently certain.

HOLT, *Chief Justice*. A man may justify in an action upon the case for words, or for a libel (b); otherwise in an indictment (c). The innuendo will not make an action upon the case for a libel good, if the matter precedent is not certain, or importing scandal, &c. to the damage of the party (d). If a man is in treaty with a woman to marry, and another tells him she is under a precontract, this does not import a scandal; but yet if it is false, an action will lie (e). In case upon a libel, it is sufficient if the matter is reflecting; as to paint a man playing at cudgels with his wife (f).

THE COURT were unanimous, that this was certain enough, * without the innuendo.

* [100]

POWELL, *Justice*, allowed the Books to be law, that where the precedent matter is not certain, the innuendo will not help.

(a) 2. Atk. 470.

(d) 4. Co. 20. Cro. Eliz. 428. Hob.

(b) Brook v. Montagu, Cro. Jac. 2. 45.

(e) 1. Com. Dig. 262.

91. (c) 2. Hawk. P. C. ch. 73.

(f) 2. Hawk. P. C. ch. 73. f. 2.

The Queen against Solely and Others.

Case 157.

INFORMATION; for that the defendants *rioteuse et routouse* assembled themselves together, and hindered the mayor, &c. to elect a bailiff.

An indictment, stating that the defendants "unlawfully, riotously and routously assembled themselves together and hindered the members of a corporation from electing

The exceptions taken were,

FIRST, That it did not appear what office this bailiff was, and so this does not appear to be a crime.

SECONDLY, That the addition of the words "*rioteuse, &c.*" is only aggravation (a).

"a bailiff," is insufficient, unless it shew that the defendants assembled for an unlawful purpose, and committed an unlawful act.—S. C. post. 115. S. C. Holt, 353. S. C. 2. Salk. 594. Poph. 202. 1. Ld. Ray. 484. 12. Mod. 262. 509. Stra. 196.

(a) See the case of Sir Robert Atkins, 3. Mod. 83.

BRODERICK,

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THE QUEEN
against
SOLELY
AND OTHERS.

BRODERICK, *Serjeant*. To make a person guilty of a riot, there must appear to be an *unlawful assembly* of three persons or more with an intent to do an *unlawful act*, which must be done (a). The verdict will not help in this case; for the jury finding it to be done *riotosè*, will not make it so: if the chief fact do not appear to be so, the verdict will not help (b). The manner of doing a lawful thing may be unlawful (c). Though this is an unlawful thing, yet it is no riot (d). In an indictment for a riot, an unlawful assembly must be laid in *terrorem populi regis* (e): and he cited the cases following, to shew that *cofrinage* is a good cause of challenge, even by the party that is *cofrin*; for if the Court sees there may be partiality, though the parties consent, yet the Court ought not to suffer it, lest justice should not be impartially administered. 21. *Edw.* 4. c. 21. *Moor*, 553. 3. *Cro.* 663.

HOLT, *Chief Justice*. It is not the adverbs "*riotosè et routosè*" that will make the offence, but it ought to appear what the crime is,

SOLICITOR GENERAL *contra*. It is objected, that the parties cannot waive the benefit of challenging by reason of *cofrinage*; but I answer, that if the law give a man a benefit, he may renounce it; an alien shall have the *medietatem linguæ*, but yet the Court shall not grant it *ex officio*, but the party* ought to pray it. *Dyer*, 107. He agreed, that if no fact was charged, the word "*riotosè, &c.*" would not make it a riot; but then it will amount to a *misdemeanor*, and they are found guilty. If people, who have nothing to do with the corporation, will *clamoribus et vociferationibus* hinder that election, this is a *misdemeanor*.

HOLT, *Chief Justice*. Never think to help an indictment by a verdict.

EYRES. It is a good information for a riot. To the first objection, that it is not set forth to be an *unlawful assembly* to an ill intent, I answer, that this is not necessary, but the doing the act is the thing; and therefore it must be intended to be done to that end, by the shouting, &c. (f); for the act could not be done unless they were so assembled. Another objection was, it does not appear that the burgesses were doing a lawful act, and so the hindering could be no offence; but I answer, that it appears they were A CORPORATION, and if the bailiff be chosen only to be their receiver, yet it is unlawful to hinder their choosing him (g). Trespass may be by threatening (h); and a riot may be *clamoribus* (i). And though the bailiff be a private officer, yet it would be a trespass to hinder the doing it; and if the hindering were by many,

(a) 2. Hawk. P. C. ch. 65.

(b) Bro. Abr. "Riot". Year-

Book 2. Hen. 7. pl. 10. 3. Inst. 176.

(c) Lambert, page 163.

(d) Year-Book 3. Hen. 7. pl. 1.

(e) 12. Aff. 32. Lamb. 178. 3. Burr.

1263. 2. Hawk. P. C. 7th edit. ch. 65. l. 5.

(f) Rastal Ent. 383. Rex v. Cole,

1. Keb 295.

(g) Reg. 106.

(h) Reg. 94.

(i) Rastal, 662.

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it would be a riot. It is not usual to shew the manner of the fact (a); the "*rioters*" will not make the fact a riot, if the special matter in the indictment shews it to be none, which he said would answer *Sir Robert Atkins' Case* (b); for there the special matter shewed the nature of the offence to be other than it was laid.

THE QUEEN
against
SOLELY
AND OTHERS,

HOLT, *Chief Justice*. Surely it ought to be laid, that the assembly came together to do an *unlawful act*; but if they came there accidentally or lawfully, if two or three do an *unlawful act*, or make a *clamour*, the rest are not guilty; *secus* if they came together on purpose (c). It does not appear that he was a public officer, indeed it is not necessary to shew their constitution. Is hindering their election such a public offence as to make it a riot? If it was an assembly of people together *in terrorem populi*, as in the highway, this without more is a breach of the peace in general; * but hindering their election is in the nature of it only particular (d).

* [102]

HOLT, *Chief Justice*, in answer to BRODERICK, objected, that no man has reason to complain of his kinsman's being on the jury: Why the reason that *knights* were to be on a jury, when a *peer* was concerned, was for the security of THE COMMONS; for a knight was presumed to be a man of courage, and not afraid to look a peer in the face.

POWELL, *Justice*. It is true, knights are for the privilege of peers, but yet for the security of THE COMMONS. We must distinguish between crimes; he agreed to the definition of a riot *ut supra*. An affray, riot, and unlawful assembly, are different offences, and consequently different punishments.

HOLT, *Chief Justice*. If I am writing a letter, and three or more come hallooing and jogging me, is this a riot? No; it ought to be *in terrorem populi*.

Adjournatur.

(a) *Dawney v. Dee*, Cro. Jac. 606.

(b) 3. Mod. 83.

(c) Burr. 1262. 1. Black. 350. Rex v. Royce, Burr. 2073.

(d) Corporations by charter are generally supposed to be for the encouragement of the trade in that corporation, and consequently an advantage to the public; and must be so intended by their having

a charter, which is not to be supposed to tend to a private advantage; if so, then to commit an offence against a corporation, which is acting for the benefit of trade, and by a charter, is a greater offence than the same act in the highway, which has only the protection of the Crown for the benefit of trade, without a charter.—NOTE to former edition.

Smith against Tindal.

Case 158.

MAXIMILIAN TAYLOR, being seised in fee, devised to the poor of *Sutton* forty shillings, to be distributed by his executors, with four coats, four hats, upon every twenty-first of November, "to my wife," reserving so much a-year to be distributed "to the poor of the parish for ever," passes, by reason of the *perpetual charge*, an estate in fee to the wife.—S. C. ante, 90. S. C. 2. Salk. 685. S. C. Holt, 235. S. C. 2. Eq. Ab. 300.

umber

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SMITH
against
TINDAL.

member for ever. He made his wife *Margaret* executrix; and also devised "all his lands, tenements, and hereditaments, and all " his personal estate, to *Margaret* the executrix." *Margaret* married with one *Archibald Tindal*, and the husband and wife by indenture, &c. covenanted to levy a fine *sur cognizance de droit come ceo* to the use of the said *Archibald* and *Margaret* for their lives, remainder to *Archibald* and his heirs, with a warranty, who conveyed to the plaintiff.

GOULD, *Justice*. The first point is, What estate is conveyed by this will? Whether an estate of inheritance? And THE SECOND point is, Whether the warranty binds? As to THE FIRST, he held it a fee, because of the words of *perpetual charge* (a). The personal estate is not, in the eye of the law, a sufficient estate to answer a perpetual charge (b). He would not speak as to the force of * the word "*hereditament*," but went upon the perpetual charge; and so would not speak to the warranty.

* [103]

POWYS, *Justice*. This being in a will, the question is, If the word "*hereditament*" will carry a fee? then, Whether the perpetual charge will not make it a fee, according to *Collier's Case* (c)? Thirdly, Whether this collateral warranty will not bar the re-butter? and lastly, Whether this warranty can be given in evidence? As to THE FIRST, he thought it might. There is a difference between the word "*inheritance*" and "*hereditament*;" the first denotes the interest, the latter describes somewhat that is not a tenement; but in this case we are on a will, and so not to go to the learned and strict signification, but for the common parlance and intention (d). To THE SECOND POINT of the charge, the will says, "to be delivered by my executrix and her assigns;" which must be construed as if "to his wife and her assigns;" for it seems to regard her not only as executrix, but as his wife personally, who was the devisee: then the warranty secures the plaintiff's title. *Vaugh.* 392. *Hob.* 27. *Brook tit. War.* 31. 19. *Hen. 6. pl.* 59.

POWELL, *Justice*. Judgment ought to be for the plaintiffs, chiefly on the warranty. A devise of "all my lands, tenements, " and hereditaments," he could not allow would carry a fee, as POWYS, *Justice*, held. The word "*hereditament*" does not signify the estate, as "*inheritance*" doth. A devise of a hundred pounds a-year, paying forty shillings a-year for ever, must be a fee of the perpetual rent. *Seymour's Case* (e). A collateral warranty may be taken notice of as well by evidence as by rebutting. He

Collateral war-
ranty.

- (a) Co. Lit. 9. b.
- (b) *Fraake v. Lee*, T. Jones, 113.
- (c) 6. Co. 16. *Reed v. Hatton*, 2. Mod. 25.
- (d) *Wedlake v. Harding*, Hob. 2.
- S. C. Moor, 873. S. C. Godb. 207.
- Wilkinson v. Maryland*, Cro. Car. 447.
- 449. S. C. W. Jones, 380. *Hopewell*
- v. Ackland*, Salk. 239. *Canning v. Canning*, Moseley, 242. *Baddely v. Leppingwell*, 3. Burr. 1533. *Frogmorton v. Holliday*, 3. Burr. 1618. *Doe v. Richards*, 3. Term Rep. 356. *Goodright v. Stocker*, 5. Term Rep. 13.
- Moor v. Mellor*, 5. Term Rep. 558.
- (e) 10. Co. 96. 1. Roll. Abr. 835. agreed

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agreed a warranty does not give a right (a). Collateral warranty attached does not extinguish the tail. Collateral warranty neither gives nor extinguishes, but binds the right, and so the entry is wrongful, because the right is bound. If tenant for life levy a fine, the fine gives a fee, but then tenant for life commits a forfeiture.

SMITH
against
TINDAL.

HOLT, *Chief Justice*. Judgment for the plaintiff. The words of the will give a fee; here being a general charge for ever, and a sufficient personal estate to purchase, &c. But he was not satisfied to fix it upon the land. He went upon the word "hereditament" * to make a fee: the words "lands and tenements" carry only an estate for life, but "hereditament" carries the fee (b); for if he had not a fee, then it was not his hereditament; and when he gives his hereditament, he gives a descendible estate, otherwise it is no hereditament (c). These words cannot be satisfied, unless this word carry the inheritance. The case of *Wedlake v. Harding*, is rightly reported in *Hobart*, and wrong in *Moor*. "Lands of inheritance" is only a description of what lands shall pass.—Touching the warranty: If a disseisor continue possession twenty years, and the disseisee enter, or bring an ejectment, the disseisor shall maintain his possession by the statute of Limitations; for he has acquired a *jus possessionis*, though not a right to the inheritance.

* [104]

(a) Fitz. Abr. "Droit" 29. Litt. Sect. 708.

(b) That the word "hereditament" will not pass a fee, see *Hopewell v. Ackland*, Salk. 239. *Canning v. Can-*

ning, Moseley, 240. *Palmer v. Richards*, 3. Term Rep. 356. *Moor v. Mellor*, 5. Term Rep. 558. (c) Co. Lit. 6.

General Instructions

The first thing I should mention is that the weather is quite good today. We went for a walk in the park and saw many beautiful flowers. The children were very happy and played for hours. We also had a picnic under a big tree. The food was delicious and everyone enjoyed it. We spent a very pleasant day and will be back soon.

Yours truly,

HILARY TERM,

The Fifth of Queen Anne,

I N

The Queen's Bench,

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

Annesly against Dixon.

Case 159.

ERROR OF A JUDGMENT in *Ireland*. On the trial of an ejectment brought by the defendant against the plaintiff, in the court of queen's bench in *Ireland*, for divers messuages in *Tippenham*, in the county of *Kildare*, the jury found the defendant *Annesly* not guilty as to ten acres, parcel of the said premises in the declaration mentioned; and as to the residue, they found a special verdict, stating the following facts:

The trustees for selling the forfeited estates in *Ireland* were not empowered to judge what estates were forfeited.

That before and at the time of the accession of the late King *James the Second* to the crown, *Robert Dixon*, the lessor of the plaintiff, was seised of the lands mentioned in the declaration, except those ten acres, in his demesne as of fee; and that King *James the Second*, at the time of his accession to the throne, or any other person to his use, or in trust for him, was not seised, possessed of, or interested in any of those lands.

S. C. Holt, 372.
377. 388.
S. C. 1. Bro.
P. C. 171.

That, by the act of Resumption, 11. & 12. *Will.* 3. entitled, "An act for granting an aid to his majesty, by sale of the forfeited and other estates and interests in *Ireland*, and by a land-tax in *England*, for the several purposes therein mentioned," it was *inter alia* enacted, "that all the honours, manors, lands, &c. whereof the late King *James the Second*, or any in trust for him, " or

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ANNISLY
against
DIXON.

“ or to his use, was seised or possessed of, or interested in, at the
“ time of his accession to the crown of *England*, should be, and
“ were vested in the trustees named in the said act, their heirs, ex-
“ ecutors and administrators respectively, from and after the se-
“ cond day of *November* 1699, according to the several estates and
“ interests which the said late king, or any in trust for him, had
“ in any of the premises at the time of his accession to the crown
“ of *England*; to the end that the same might be sold, disposed of
“ and applied by the said trustees, to and for the purposes in the
“ said act mentioned. And, that no person having any estate,
“ right, title or interest, in law or equity, into or out of any of
“ the said forfeited or forfeitable estates or interests, or any other
“ the estates or premises, before the thirteenth of *February* 1688,
“ might be in any respect whatsoever prejudiced; it was further
“ enacted, that all persons, &c. having any estate, right, title, &c.
“ in law or equity, into, out of, or upon any honours, manors,
“ lands, &c. therein before vested in the said trustees, before the
“ said thirteenth of *February* 1688, by reason of any settlement,
“ &c. or incumbrance affecting the said estate; should, on or be-
“ fore the tenth day of *August* 1700, enter all their respective
“ claims and demands thereunto: and in default thereof, every
“ such estate, right, title and incumbrance, were declared to be
“ void; and the estate or estates, so as aforesaid liable thereunto,
“ or charged therewith, should from thenceforth be freed and dis-
“ charged from the same; and such claims were to be transcribed,
“ by order of the said trustees, and entered in books as a perpetual
“ memorial thereof. And the said trustees, or any seven or more
“ of them, were thereby impowered, according to their best dis-
“ cretion, to hear, determine and judge every such claim, at any
“ time after the entry thereof, and before the twenty-fifth of *March*
“ 1701; and if such claim should not be allowed by the said
“ trustees, the claimant, his heirs, executors, administrators and
“ assigns, should be for ever barred and without remedy: And the
“ said trustees, or any seven or more of them, might in such cases
“ dispose of such writings, deeds or evidences, in such manner as
“ to them should seem meet.” And it was further enacted,
“ That the said trustees, or any seven or more of them, should be
“ a court of record; and every judgment, determination, or de-
“ cree of theirs should be entered of record in books of parch-
“ ment, and should be obeyed by all persons concerned therein
“ respectively; and should be final, and should conclude and bind
“ all and every person or persons, their heirs, executors, ad-
“ ministrators and assigns; notwithstanding any disability in re-
“ spect of coverture, infancy, non-sanity of memory, or other
“ matter or thing whatsoever; and all infants, *feme-coverts*, ideots,
“ persons of non-sane memory, or beyond the seas, corporations,
“ and all other persons, bodies natural and politic, their heirs and
“ successors, and their respective interests, should be bound and
“ concluded by such judgment, determination and decree, accord-
“ ing to the tenor and purport thereof, any law, statute or custom,

“ or

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"or other matter or thing to the contrary notwithstanding.
 "And after the time for entering such claims, the said trustees, or
 "any seven or more of them, were enabled and required, at any
 "time before the twenty-fifth of *March 1702*, to sell all the estates
 "and interests thereby vested in them as aforesaid, or any parcel
 "thereof, and such sale was to be by cant or auction; and the
 "said trustees were to execute an indenture of bargain and sale
 "to the buyer, and such indenture should be immediately entered
 "and transcribed in books to be provided by the trustees for that
 "purpose, and should then be delivered to the purchaser, who
 "was to cause such indenture to be inrolled in the chancery of
 "*Ireland*, within six months after the date thereof. And the
 "persons making such purchase, and having such conveyance and
 "assurance as aforesaid, were adjudged in actual seisin and possession
 "of such parts and parcels of the premises, as should be so
 "purchased and conveyed; and should hold the same for such
 "estate or interest therein as should be conveyed by the said
 "trustees, discharged from all arrears of rents, and all demands
 "of the king, his heirs and successors, and of the trustees, their
 "heirs, executors, administrators and assigns, and of every other
 "person whatsoever; except such claims and demands as should
 "be allowed by the trustees, in the determination of such claims
 "as aforesaid; and also freed and discharged from any breaches of
 "trust, which might be pretended to have been committed by the
 "said trustees, in not strictly pursuing the powers and directions
 "given by the said act."

ANNISTY
 against
 DIXON.

That *Robert Dixon*, the lessor of the plaintiff, made a claim
 before the trustees, and therein stated his title by letters patent of
 the thirtieth of *March*, 15. *Car. 1.* made in pursuance of a com-
 mission of grace for remedy of defective titles; whereby all the
 lands then in possession of *Sir Robert Dixon* or his tenants, con-
 taining by estimation two-thirds of the lands of *Tippenham*, or
 thereabouts, and reputed one hundred and thirty acres of arable,
 and thirty acres of pasture, were granted to *Sir Robert* and his heirs,
 who entered and was seised to the time of his death; and then *Sir*
William Dixon, his son and heir, entered and was seised, till he was
 dispossessed in the time of the civil wars; but upon his plea in the
 exchequer of *Ireland*, he was, in the year 1661, restored, and
 quietly held and enjoyed the said lands. That one *Robert Sher-*
lock was seised in fee of five houses and thirty acres of land in *Tip-*
penham, being about one half of the remaining third, and mort-
 gaged the same to *Robert Moore* in fee: and one *Pierce Fitzge-*
tald was seised in fee of the other moiety of that third part, being
 one-sixth of the whole. That a moiety of the lands was seized and
 sequestered as the lands of *Fitzgerald*, though he was, in fact,
 only proprietor of a sixth part; and that *Robert Moore*, being ad-
 judged an innocent papist, had a decree for his mortgaged lands,
 and was put in possession thereof by order of the commissioners,
 and thereby became seised in fee. That the said *Robert Moore* and
James Sherlock, the son and heir of the said *Robert Sherlock*, by
 deed

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ANNESLY
against
DIXON.

deed of feoffment, dated the fifth of May 1664, and by fine, in consideration of one hundred and twenty pounds, conveyed their said lands to *Sir William Dixon*, whereby he was seised of the said mortgaged lands; and he was also seised in fee of his two third parts as aforesaid, and died; whereupon the same descended to *Sir Richard Dixon*, who entered and enjoyed till he died, in June or July 1684, and by his death the lands descended to the claimant, then under the age of ten years; who, by *Francis Annesly* his guardian (the now plaintiff in error) entered on the same and was seised. The claim then stated, that all that part of the town and lands of *Tippenham*, which formerly belonged to *Pierce Fitzgerald*, was by letters patent conveyed to the *Duke of York*, and his heirs; and that *Sir William Talbot*, the duke's commissioner, took upon him in 1680, to demise for thirty-one years to one *Quin*, the half of *Tippenham*, containing, as was alledged, two hundred and nine acres, at the yearly rent of two shillings and sixpence for every acre. That *Quin*, in 1695, demised this moiety for seventeen years to the said *Francis Annesly*, at the yearly rent of three shillings and eight pence per acre; and under colour of such demise the said *Francis Annesly* possessed himself of that part which was conveyed by *Moore* and *Sherlock*. That the fee-simple of the premises, which belonged to the *Duke of York*, was vested in the trustees; but without making any claim thereof, the claimant averred his title to the two-thirds of which he was in possession, under the patents before stated, and also to the moiety of the other third, conveyed by *Moore* and *Sherlock*, and then possessed by *Mr. Annesly*, under colour of the lease from *Quin*; and he claimed the benefit of that lease as a trust for him, being taken by his guardian. That the trustees, by their decree and adjudication of the fifth of September 1700, thought fit to adjudge, that the claimant should enjoy one moiety of the lands of *Tippenham*, to him and his heirs; and that his claim as to any other or further part of the said lands, should be disallowed and dismissed.

The jury further found, that the trustees, in consideration of one hundred and eighty-four pounds six shillings and seven pence halfpenny paid by the said *Francis Annesly*, and of the further sum of one hundred pounds, allowed to him by order of the trustees, for service in making out their title to the said lands of *Tippenham*, by their indenture of bargain and sale, dated the seventh of June 1703, did bargain and sell to the said *Francis Annesly* and his heirs, all that the moiety of the town and lands of *Tippenham*, containing by estimation one hundred and sixty-one acres, with their appurtenances; all which said premises, the deed says, were late parcel of the estate of the late *King James the Second*, at the time of his accession to the crown of *England*, and now are in the possession of the said *Francis Annesly*, and his under-tenants. Then they found that *Annesly* being in possession, *Dixon* entered upon him, and made the lease set forth in the declaration, and that *Annesly* re-entered and ejected the lessee; and conclude generally,

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against
DIXON.

If, upon the whole matter, the Court shall judge he is guilty of the trespass and ejectment of the residue of the lands, beyond the said ten acres, they find him so; and if they shall adjudge him not guilty, they find him not guilty.

The question was; Whether the late *Irish* trustees; authorized by the statute 11. & 12. *Will.* 3. c. 2. to inquire of the forfeited estates, had the sole power of judging what were forfeited estates, and what not; or, whether that might be found by a jury?

All the Judges but POWYS, *Justice*, held, that point ought to be decided by a jury.

HOLT, *Chief Justice*. It appears that all the private estate *King James* had at the day he came to THE CROWN, and all the *forfeited estates, are vested in the trustees; and these estates were designed to be sold for the purposes in the act; and the person or persons seised of such lands are by this divested, though upon never so valuable a consideration. If a forfeiting person had only a right of action or entry, yet this is vested in the trustees; the like of a condition. If the forfeiting person had an estate for life or remainder, such estate and such only is vested. If a person is disseised by *King James*, the disseisee is bound to make claim; which shews this is a special and particular jurisdiction of such and such lands. All jurisdictions are limited to place, persons and things. Their jurisdiction here, arises from the lands vested. The statute vests such lands as really were *King James's*; but not such as they should say were vested; and the statute gives them no other jurisdiction. But to say, the trustees had a power to say an innocent person's estate should be liable, &c. would be a hellish construction, and such as the Parliament of *England* could never intend. If they cannot know what were the king's lands, they cannot inquire; and therefore they ought to inform themselves aright; for a man can purchase no better of other estate than the attainted person had.

POWYS, *Justice*, said, the jury have nothing to do with it; this is begging the question. For a jury are to inquire whether the lands are vested? and if they were not vested; the trustees had no jurisdiction, and it was *coram non judice*. *Marshall's Case (a)*: Suppose a man bring a *formedon* here, and the tenant admit and plead, and then another is brought in the common pleas; the tenant cannot plead this here in bar; for it is void here, and *coram non judice*.

So the judgment in *Ireland* was affirmed, contrary to POWYS, *Justice*.

But to reverse both these judgments a writ of error was brought R. Donkin. in parliament; and on behalf of the plaintiff in error it was contended, that if the trustees under the act of parliament had not a power to declare, adjudge and determine what was forfeited and

* [105]

(a) 10. Co. 62. 1. Brownl. 199. 2. Brownl. 124.

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against
DIXON.

vested in them, and what not, the clause obliging persons to enter their claims before them, would be not only useless but vexatious; and if the decree and sale of the trustees should not be an incontrovertible title to the protestant purchasers, then must such purchasers, upon any trial, prove the estate and title at law of the forfeiting persons; but which it was impossible for them to do, because the forfeiting persons having withdrawn with all their deeds and evidences, the protestant purchaser was totally naked and destitute of any defence, save only the decree and sale of the trustees. That if it had been imagined that the trustees decree was not final and conclusive, very few, if any, would have become purchasers; and consequently the public debt, which was the consideration of the act, would have remained unsatisfied. That it would be the greatest hardship imaginable, upon all those who had debentures, to have no fund but this, for the payment of them; and to be in a manner compellable to buy these forfeited estates therewith, and yet liable to be evicted from them. That many of the army and others, who had purchased these estates with the hazard of their lives and loss of their limbs, and had greatly improved them, and made settlements of them on their families, were not able to prove any other title than the decree and sale of the trustees; and therefore, if that should not be sufficient, they were liable to be evicted and turned out of all. That the only objection of weight against this power being in the trustees, was, that they might have sold all the innocent person's estates in *Ireland*; but it might as well be said, that the Judges in *Westminster-Hall* and a jury had too great power, and might wrongfully determine every cause that came before them; which was not to be presumed, and was an objection against all judicatures. That the trustees had the approbation of both houses of parliament, and were upon their oaths, and took all imaginable care in their determinations; so that out of near four thousand titles, which they had determined, not above four or five persons thought themselves aggrieved. And, that the defendant *Dixon* having had his claim fairly and fully heard before the trustees, and the same having been determined and decreed against him, it was hoped that the judgments would be reversed.

J. Jekyll.

St. J. Broderick.

On the other side it was insisted, that the determination of the trustees, as to the lands in question, was *coram non judice*, nothing being subject to their judgment or disposition but what was vested in them; and nothing was vested in them to be disposed of, or intended to be so, but the estates of forfeiting persons, and the private estate of the late *King James*. That this was not pretended to be a forfeited estate, nor was it ever part of *King James's* private estate; and therefore, if the act should receive the construction contended for by the plaintiff, so as to give the trustees any power over this estate, it would at the same time have put it in their power to dispose of every estate in the kingdom of *Ireland*.

Judgment affirmed.
Jour. vol. 18.
p. 279.

After hearing Counsel on this writ of error, it was ordered and adjudged, that the judgment given in the court of queen's bench in

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in *Ireland*, and the affirmance thereof in the court of queen's bench in *England*, should be affirmed; to the end, that execution might be thereupon had, as if no writ of error had been brought in the court of queen's bench in *England*, or into the house.

ANNISLY
against
DIXON,

* [106]

* St. George's Southwark *against* St. Margaret's Westminster. Cafe 160.

ORDER OF SESSIONS. Three children born in *St. George's* parish, on the body of *Margaret Bilby*, wife of *George Bilby*, an inhabitant of *St. Margaret's Westminster*. Children born nine months after a divorce *à mensâ et thoro*, are bastards, unless the husband's access be proved.

The inhabitants of *St. Margaret's* alledged, that the mother was a lewd woman, and was divorced *à mensâ et thoro* from her husband, and had the children a long time after the divorce; but the justices sent them to *St. Margaret's Westminster*, seeing the husband lived there; supposing that to be the place of their last legal settlement.

BRODERICK, *Serjeant*, moved to quash the order, for that the children were bastards.

HOLT, *Chief Justice*, and the other Justices. They are bastards, being begotten by an adulterer after a divorce.

IT WAS OBJECTED, it did not appear by the order but that the husband got them.

HOLT, *Chief Justice*. We will intend the contrary, unless you can prove their cohabitation. But being of great consequence,

Adjournatur.

S. C. 1. Salk.
123.
S. C. Sett. and
Rem. 154.
1. Bl. Com. 457.
1. Bott P.L. 395.
1. Stra. 51.
B. R. H. 20.
2. Stra. 1076.

Bunker *against* Coke.

Cafe 161.

THE QUESTION was, Whether lands of which the deviser was not then seised, shall pass by a devise?

RAYMOND cited the case of *Butler and Baker (a)*, the case of *Drew v. Marrow (b)*, and *Lovie's Case (c)*; and urged, that no law supports my Lord Coke's opinion; and the opinion of *Dyer* was only *obiter*; and the resolutions on the statute of Wills as to the word "having." Coke in his Commentary (d) does not take notice of the opinion of *Littleton* as to the custom, that any man seised of lands may devise. He might as well devise lands to be had as chattels, from the nature of the writ *ex gravi querelâ (e)*. Besides, he was seised of them before the devise took effect.

S. C. post. 121. S. C. Fitzg. 225. S. C. Salk. 237. S. C. Holt, 236. 243. 246. 248. 746. S. C. 2. Eq. Ab. 295. S. C. 1. Bro. P. C. 199.

(a) 3. Co. 30.
(b) *Dyer*, 158.

(c) 10. Co. 85.

(d) Co. Lit. 111. b.

(e) Fitz. N. B. 193. Plowd. 343.
Year-Book 39. Hen. 6. pl. 18. Fitz.
"Devise" 17. Bro. Abr. "Devise" 15.
Litt. Sect. 167.

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BUNKER
against
COKE.

* [107]

SERJEANT PARKER *contra*. These lands were purchased nine years after the date of the will. Here are two points; * FIRST, A want of power in the deviser at the time, &c. as not being seised. SECONDLY, As to his intent; which may well be doubted, if it were to pass these lands. Heirs are to be favoured; and this would be to carry a will further than a deed, or a man's grant. He cited *Co. Lit.* 327. *b.* that the exposition of this statute ought to be according to the reason of the common law; and 2. *And.* 12. *Dyer*, 154. If persons, ideots, infants, &c. had not been named, yet being disabled by the common law, they could not have devised. The common law will not allow it good when he has it not. For a man cannot judge right as to future things, 1. *Inst.* 47. *Dyer*, 49. *a.* *Hob.* 45. 156. *Litt. S. et.* 446. *Hob.* 132. 3. *Cro.* 401. A covenant to stand seised to uses of lands which a man has not, is void. 2. *Roll.* 190.

Adjournatur (a).

(a) See same case, post. 121.

Case 162.

Anonymous.

Writ of error for
a *superfedeas*
without notice.

6. *H. 4.* 14, 15.
Godb. 430.

Tidd. Pract. 715.

PER CURIAM. A writ of error allowed by the Chief Justice, or clerk of the errors, is a *superfedeas*; though the attorney of the other side has no notice, and the notice is only to bring him into contempt (a)

(a) See *Parkins v. Woollaston*, 6 Mod. 130. 139. S. C. 1. Salk. 321. *Sweagapple v. Goodfellow*, 2. Stra. 867. S. C. 2. Ld. Ray, 1567. *Smith v. Nicholson*, 2. Stra. 1186. S. C. 1. Wilton, 16. *Capion v. Archer*, 1. Burr. 340. *Jaques v. Nixon*, 1. Term Rep. 279. *Parry v. Campbell*, 3. Term Rep. 390.

Case 163.

Brown against Dyer.

Customary dis-
cents guided by
the rules of com-
mon law.

S. C. ante, 70.

73. 98

S. C. Holt, 165.

DYER, seised of copyhold lands in fee, in nature of *Burrough English*, surrendered to the use of himself for life; remainder to his wife for life; remainder to the heirs of their bodies.

PER CURIAM. When a copyholder surrenders to the use of himself for life; remainder to the wife for life; remainder to the heirs of their bodies; although there is no admittance pursuant to this surrender, the son shall have a fee-simple; for his father's estate continues in the same plight, &c.

THE COURT seemed clear, that the customary descent should be governed by the reason and rules of the common law (a).

(a) See *Reeve v. Malster*, Cro. Car. 410. S. C. 1. Jones, 361. *Clements v. Scudamore*, 1. Peer. Wms. 63. 6. Mod. 120. 2. Ld. Ray. 1024. 1. Salk. 243. and *Den*, on the demise of *Goodwin v. Spray*, 1. Term Rep. 466.

Tuckerman

* Tuckerman *against* Jefferies.

Case 164.

IN AN ACTION OF TRESPASS, on not guilty pleaded, a special Jointenants or
verdict was found, that *Somaster*, being seised in fee of the *locus* tenants in com-
in quo, made a will thus : " I TEM, I give unto the wife of *Thomas* mon.
" *Jefferies*, and *Elizabeth*," the wife of another, " all my estate, S. C. post. 108.
" to be equally divided between them for their lives; and after S. C. Holt, 370.
" their deaths, to the right heirs of one of them."

THE QUESTION was, Whether this be a joint estate; or,
Whether they are tenants in common? *V. Stile*, 211.

Adjourned till next Term to be argued. *Vide infra*.

E A S T E R T E R M,

The Sixth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

Tuckerman *against* Jefferies.

Case 165.

DEVISE of "all my estate to my two nieces, to be *equally* divided between them, during their lives; and from " and after their decease, to the right heirs of one of " them."

MR. EYRES. That this is a joint estate. "To be *equally* divided," is a quality of a *jointenancy*, as well as to a *tenancy in common*; and the words "to be *equally* divided" is what the law implies. *Stile*, 211. 2. *Roll. Abr.* 90. 2. *Leq.* 70. If this should be construed, that they should take by *moieties*, it may happen that the right heirs of the one may never take the whole; because the remainder, *quoad* the moiety, is contingent. 4. *Leo.* 14.

A devise of "all
" my estate to
" my two nieces
" to be *equally*
" divided be-
" them during
" their lives, and
" from and after
" their decease
" to the right
" heirs of one of
" them," creates
a *jointenancy*.
S. C. ante, 103.

S. C. Holt, 370.
Post. 119.
2. Bl. Rep. 1211.

* PENGELLY. Here are not subsequent words of sufficient force to overturn and weaken the force of the former words; and upon this the distinctions run. 3. *Lev.* 373, 374. *Style*, 434, 435. *Raym.* 452. *Dalison*, 77. If it be joint, then the heir may lose his moiety during the life of the other, which will be equal to the contingency.

* [109]

HOLT, *Chief Justice*. The cases MR. PENGELLY cited, as to the words "*equally* divided," run on this reason, that if they did

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TUCKERMAN
against
JEFFERIES.

did not make a *tenancy in common*, they would signify nothing (a). He agreed to the case put by EYRES of the contingency.

The opinion of the Court seemed to be, that it was a *jointenancy*; by reason of the danger of the contingent remainder, which otherwise might be lost.

Adjournatur.

NOTE, In *Trinity Term* following,

HOLT, *Chief Justice*, delivered the opinion of the Court, that this was a *jointenancy*, by reason of the contingent remainder (b).

(a) Prince v. Heylin, 1. Atk. 493. 3 Brown C. C. 25. Campbell v. Campbell, 4. Brown C. C. 15.
Fisher v. Wegg, 1. Peer. Wms. 14.
Owen v. Owen, 1. Atk. 494. Hawes
v. Hawes, 3. Atk. 525. Rigden v.
Vallier, 3. Atk. 731. Jolliffe v. East, 157. Rose v. Hill, 3. Burr. 1881.

(b) Hambleton v. Hambleton, Cro. Eliz. 164. 431. Barker v. Giles, 9. Mod.
157. Rose v. Hill, 3. Burr. 1881.

Case 166.

The Queen against Lord George Howard.

Sureties to keep the peace cannot be discharged, until the condition of the recognizance is performed.

LADY HOWARD exhibited articles of the peace against her husband the defendant (a); whereupon he was bound to keep the peace for a year (b).

SIR EDWARD NORTHEY moved to discharge the recognizance, upon a suggestion that my Lady was consenting; and his being bound was upon her prayer.

HOLT, *Chief Justice*. How can we discharge it before the condition is performed (c)? Besides, if my Lord breaks the peace upon any one else, it is a forfeiture of his recognizance (d).

And so denied the motion.

(a) See Marquis of Carmarthen's Case, Fort. 359. Rex v. Lord Vane, 2. Stra. 1202. Rex v. Earl Stamford, B. R. H. 74. Rex v. Earl Ferrers, 1. Burr. 631. 703.

(b) See 2. Hawk. P. C. 7th edit. ch. 60. f. 15. and Rex v. Bowes, 1. Term Rep. 696.

(c) See Rex v. Lewis, 2. Stra. 835.

Mr. Clavering's Case, 2. Peer. Wms. 205. King v. King, 2. Vezey, 578. Rex v. Earl Ferrers, 2. Burr. 703. 1. Burr. 636. Rex v. Hon. Peter Mackenzie, 3. Burr. 1922. and 2. Hawk. P. C. 7th edit. ch. 60. f. 17.

(d) King's Case, Cro. Eliz. 86. Rex v. Stanley and his Bail, Sayer, 139.

Case 167.

Mr. H——t's Case.

Enrolment of deeds where evidence.

NOTE, In this case HOLT, *Chief Justice*, declared, FIRST, That whenever a copy of a deed shall be allowed as evidence, there the enrolment of a deed for safe custody shall be so allowed.

SECONDLY, That a copy of a deed is good evidence, where the deed is lost, burnt, &c. or is almost worn out, * or obliterated; because in those cases there is plain evidence of the deed itself.

THIRDLY,

Easter Term, 6. Queen Anne, In B. R.

THIRDLY, That the evidence of a copy of a deed inrolled is only conclusive to those that acknowledge it; therefore it is necessary all parties to it acknowledge it, and then it amounts in effect to a new deed. Mr. H—T^h
Case.

FOURTHLY, That it is also necessary, where a man's evidence consists in such copies, that he has a covenant from the party that has the originals, to produce them whenever he may have occasion for them.

The Queen against Standish.

Case 168.

MR. EYRES moved to quash an order of sessions; which was to force an administrator to refund the money the intestate received with his apprenticeship; which was to the trade of a barber-surgeon. Quere, Whether
a barber-surgeon
was a trade within
5. Eliz. c. 4.

He took two exceptions:

FIRST, That a barber-surgeon is no trade named in the statute 5. Eliz. c. 4.; nor was it a trade at the time the statute was made (a). He cited a case adjudged so, of an indictment against one for using the trade of a merchant-taylor; which indictment was quashed.

CHESSHIRE, Serjeant, said, that there is a general clause in the statute which extends to all trades (b).

SECONDLY, That it would be of dangerous consequence to charge an administrator. The sessions
cannot order an
administrator to
refund any part
of the fee which
the intestate had
received with his
apprentice.

And of this opinion THE WHOLE COURT seemed to be strongly; for how can the justices examine the matter of assets? and their order is not like a judgment, which an executor may plead, and which is always *de bonis testatoris*; but in this case they must attach the party himself.

CHESSHIRE, Serjeant, argued, that a decree of a court of equity (c), and an order of sessions, are in nature of judgments; and would be allowed of in a plea by the administrator; 1. Bott, 523.
Cro. Eliz. 553.
Burr. S. C. 320.

(a) See 8. Co. 129. Palm. 528. 4. Mod. 145. Rex v. Slaughter, and Rex v. Harper, 2. Salk. 611.

(b) The 5. Eliz. c. 4. f. 31. enacts, "That it shall not be lawful to any person or persons to set up, occupy, use or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at least as an apprentice;" and by 32. Hen. 8. c. 42. barbers and surgeons were incorporated and made one company; but by the

18. Geo. 2. c. 15. the company of Barber-Surgeons was dissolved, and the two trades in London made separate and distinct corporations, and it has been decided that a barber is a trade within the statute. 1. Lev. 87. 2. Lev. 206.

(c) See Soam v. Bowden, Finch C. R. 396. that the court of chancery will decree a return of the apprentice fee on the death of his master; and as to parish apprentices, a power is now given in this case to two justices by 32. Geo. 3. c. 57. f. 2.

Which

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THE QUEEN
against
STANDISH.

Which THE COURT in great measure denied; for no writ of error lies in either case.

To this CHESHYRE, *Serjeant*, urged, that a *certiorari* is a writ of error, &c.

But the case was adjourned,

* [III]

Case 169.

* Anonymous.

Copy of Court-rolls refused by the lord.

HOLT, *Chief Justice*. If a lord of a manor refuse a tenant a sight or copy of a court-roll, to make such use of them as the tenant may think proper, either to ground a fine upon, or make his defence, HALE was of opinion, that an *attachment* should go against the lord. The like law as to a corporation, as to the inspection of books (a).

(a) Lane v. Dr. Bentley, post. 134.

Case 170.

Lord Herbert against Shaw.

A letter written by the father of a plaintiff to each particular juryman, requesting his attendance on the trial, and professing that he will take it as a great obligation to himself, &c. is not a ground for granting a *new trial*.

S. C. post. 118.

BRODERICK, *Serjeant*, moved for a *new trial*, upon a letter under the Duke of Leeds's hand, to influence a juryman. The letter was to this purpose, "that he should think himself obliged to him, and would quit the obligation whenever it was in his power, &c. He cited *Moor*, 816. *Noy*, 102. 2. *Inst.* 484.

SIR EDWARD NORTHEY, *contra*. Writing letters to gentlemen, to desire them to be ready, and to solicit them to attend, is grown into a constant practice; and must be allowed of, so far as it tends only to solicit to get a full jury. He produced an affidavit that the attorney on the other side had notice of that letter before the trial.

RAYMOND. It is only a letter to the gentlemen to come and do their duty, and to attend; and tends to no discovery of the matter of fact, nor to prepossess the jury; and the conclusion is only a usual compliment, "Which I shall take as a great obligation, and shall be glad of an occasion to shew how much I am your humble servant."

HOLT, *Chief Justice*, ordered the attorney to be sworn, whether he knew anything of this letter before THE ASSISES. He was sworn, and said, that he did not know of it, any otherwise than as a flying report.

THE COURT thought this letter something more than the usual compliment. The Duke of Leeds was a stranger to the issue, but he was a remainder-man, and so might maintain, as a father might maintain * lawfully for a son.

* [112]

HOLT,

Easter Term, 6. Queen Anne, In B. R.

HOLT, *Chief Justice*. But a father ought not to make use of his authority or nobility for his son. *Lord Herbert's* lady was the *Duke of Leeds's* daughter.

LORD
HERBERT
against
SHAW.

But the opinion of THE COURT seemed to be not to grant a new trial.

Sed Adjournatur (a).

(a) This case was argued again in the ensuing Term, and the Court was unanimously of opinion, that as the defendant had notice of this letter having been

written long before the trial, and time enough to move for a *trial at bar*, that no new trial ought to be granted. S. C. post. 118.

EASTER

E A S T E R T E R M,

The Sixth of Queen Anne,

I N

The Common Pleas.

Thomas *Lord* Trevor, *Chief Justice*.

Sir John Blencowe, *Knt.*

Thomas Bury, *Esq.*

Robert Tracey, *Esq.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

Trevillian against Pine.

Case 171.

REPLEVIN. The defendant made confance as bailiff to
J. S. The plaintiff pleaded, that he took the cattle *de* being bailiff,
injuriâ suâ propriâ; *ABSQUE HOC* that he was bailiff to traversable.
J. S. The defendant demurred. S. C. Salt. 107.

TREVOR, *Chief Justice*, delivered the judgment of the Court, that the being bailiff in replevin, or in avowry, is traversable; and cited *Dobson v. Douglas* (a), *Buller's Case* (b), and *Payne's Case* (c); for otherwise a man might be twice charged: for suppose, in the avowry, damages are given: then suppose the lord brought trespass, and the tenant pleaded the recovery in the replevin, this shall not conclude the lord; for it would be very mischievous, that the lord should be concluded, and not be able to say that he was not his bailiff, and had no authority either express or implied. He agreed that the difference taken in the *Earl of Bedford's Case* (d) was an authority against him, but the Books above cited are all to the contrary. and so 1. *Roll. Rep.* 46. Also a difference betwixt trespass, *Yelv.* 148. for *clausum fregit*, and for

(a) 3. Lev. 20.

(b) 1. Leon. 30.

(c) 2. Leon. 207.

(d) Cro. Eliz. 14.

taking

Easter Term, 6. Queen Anne, In C. B.

TREVILLIAN taking cattle. In the one case, not his freehold, is a good plea.
against *Sed non è converso*, for I may have property in the cattle, *Bro. tit.*
PINE. *Trav. 3.* Bailiff or not bailiff may be given in evidence, *à for-*
tiori it may be pleaded. An agreement or consent subsequent will
amount to an authority, &c.

And THE WHOLE COURT agreed that it is traversable.

EASTER

E A S T E R T E R M,

The Sixth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

Hoskins against Lee.

Case 172.

A MOTION was made for a prohibition to the spiritual court, upon a libel there for these words, "He is a great rogue ; scandal. " as great a rogue as ever was hanged ; and deserves to be hanged more than *Dr. Pims*." Post. 117.

A prohibition was granted, because no spiritual defamation,

* *HOLT, Chief Justice*, said, If *A.* call *B.* "a son of a whore," he cannot libel in the spiritual court ; but his mother may, because in this case it is no spiritual defamation to the son ; but it is to the mother (*a*).

* [113]

(a) See *May v. Horfe*, post. 117. *Vincent v. Alpy*, 3. Lev. 119. *Lownds v. Herbert*, 2. Roll. Abr. 296.

The Queen against Hickeringill.

Case 173.

HICKERINGILL was indicted and found guilty of a misdemeanor, in altering an assessment, which he with the other commissioners signed in pursuance of the land-tax act, which was enacted at a sessions of parliament held in *November* in the fourth year of *Queen Anne*. An indictment on a statute, omitting to state the prerogation of the parliament at which it was made, is erroneous.

Easter Term, 6. Queen Anne, In C. B.

THE QUEEN
against
HICKERIN.
GILL.

Exception was taken, that in the indictment the act was not well set forth; for though the writs of parliament were returnable the fourteenth of *June*, the time mentioned in the indictment, and right according to the printed book, yet being prorogued until *October*, the sessions did not commence until then :

Whereupon the indictment was quashed (a).

(a) See *Bond v. Tricket*, Cro. Eliz. Langley *v.* Haynes, Moor, 302. Ran 853. Barnes *v.* Hill, Cro. Car. 123. *v.* Green, Cowp. 474. Watson *v.* Shaw Read *v.* Potter, Cro. Jac. 138. Sir and Others, 2. Term Rep 654. See Edward Waldgrave's Case, Dyer, 203. also 4. Hawk. P. C. 7th edit. 63, 64.

Case 174.

The Queen against Harris.

An indictment for entering a field and carrying away twenty oaks there growing. is good for the trespass and bad as to the asportation. S. C. post. 121. S. C. Holt, 352.

HARRIS was indicted for riotously entering the close of J. S. and cutting down and carrying off twenty ashes and thirty oaks, *ibidem crescentes, de bonis et catallis* of J. S. and his wife.

PENGELLY for the defendant said, they could not call them *bona et catalla* of the husband and wife (a), and being faulty in that respect, the whole is void, and must be quashed; being different from the case of *Rex v. Willow* (b), where the offences were distinct and several.

PARKER *contra*. They are several trespasses, and though void for one, yet may be good for the rest.

PER CURIAM. Judgment for the queen, as to entering the close (c), and the indictment void as to the rest; for trees growing cannot be called *bona et catalla*.

(a) Revel *v.* Gray, Hob. 184. S. C. Noy, 19. Buckley *v.* Hales, Cro. Jac. 655. S. C. 2. Roll. Rep. 272. S. C. Palm. 338. Talbot *v.* Bacon, 1. Lev. 3. (b) Latch, 173. (c) But see *Rex v. John Store*, 3. Burr. 1698. *Rex v. Atkins*, 3. Burr. 1706. *Rex v. Blake*, 3. Burr. 1731.

* [114]

Case 175.

* The Queen against Pawlett.

In an indictment for not executing a warrant founded on a summary conviction, it is sufficient to state that the party was "in due form convicted."

AN INDICTMENT against Pawlett, for not executing a warrant of a justice of peace upon a common baker, for exercising his trade on a Sunday, contrary to the statute 29. Car. 2. c. 7.

Exception was taken to the indictment, that it does not appear the conviction was within ten days after the fact, which is the time limited by the act; the indictment said only *debito modo convictus*.

HOLT, Chief Justice, was of opinion, that since it was said that he was convicted, it shall be taken for a good conviction in all respects; and the defendant should have taken advantage of the contrary, by shewing it in evidence upon the trial.

Easter Term, 6. Queen Anne, In C. B.

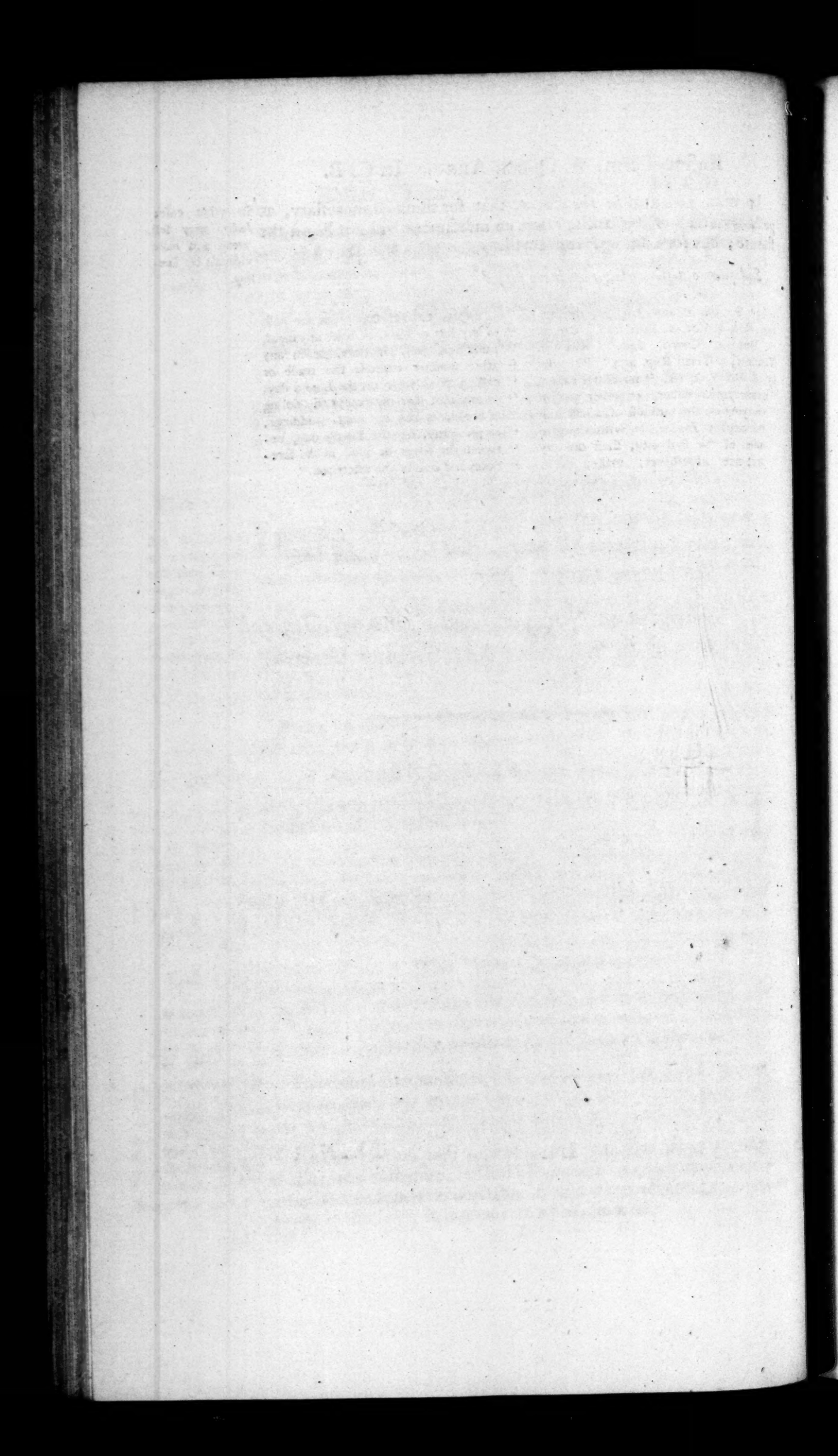
IT WAS AGREED by the Court, that for things unnecessary; as puddings and pies, for baking them an indictment will not lie on the statute; but for baking bread it will.

In what cases bakers may sell bread and bake victuals on Sunday.

Sed quære differentiae rationem (a) ?

(a) See the reasons for this distinction, Rex v. Cox, 2. Burr. 786. Crepps v. Durden, Cowp. 640. Rex v. Younger, 5. Term Rep. 499. But now by 34. Geo. 3. c. 61. "no master baker, journeyman baker, or other person carrying on the business of a baker in the city of London, or within twelve miles of the said city, shall on any pretence whatsoever, make, bake,

" or expose to sale any bread or rolls
" of any sort or kind, or bake any meat,
" puddings, pies, or tarts, or in any
" other manner exercise the trade or
" calling of a baker on the Lord's day,
" or any part thereof, except the selling
" of bread, or baking meat, puddings,
" or pies only, on the Lord's day, be-
" tween the hours of nine in the fore-
" noon and one in the afternoon."



TRINITY TERM,

The Sixth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

The Queen against Lady Oglethorpe.

Case 176.

INDICTMENT for *high treason* upon the statute of 1. *Jac.* 1. The attorney, by c. 4. for converting her servant-maid to the Roman catholic religion. To which *not guilty* was pleaded. *sign manual, may confess the plea of not guilty in high treason.*

Upon the first day of the Term, THE ATTORNEY GENERAL came into court and confessed the plea to be true (a), by * a special mandate from THE QUEEN (b); [115]

Whereupon she was discharged.

(a) See *Goddard v. Smith*, ante, 36.

(b) See *Rex v. Wilkes*, 4. Burr. 2551.

The Queen against Soley and Others.

Case 177.

THE DEFENDANTS were convicted upon two informations for riots. *An indictment for unlawfully and riotously entering the Guildhall of a borough and preventing the burgesses*

THE FIRST was for hindering the bailiffs and burgeses of *Bewdley* in their choice of a bailiff for that corporation; and the information set forth, that the bailiffs and burgeses being assembled from electing a bailiff of the corporation, must shew the authority of the corporation to elect such bailiff. *S. C. ante, 100. S. C. Holt, 353. S. C. Salk. 594.*

Trinity Term, 6. Queen Anne, In B. R.

THE QUEEN against SOLEY AND OTHERS. to choose a bailiff for the borough of *Bewdley*, the defendants *riotosi et routosi clamoribus et vociferationibus*, &c. hindered them upon the said election.

THE SECOND information was for breaking open the door of THE GUILDHALL of the borough of *Bewdley*; and it set forth, that the defendants, on the twenty-third day of *October*, did assemble themselves to disturb the peace, *et sic assemblat*. did break open the door of a certain house, called THE GUILDHALL of the borough of *Bewdley* aforesaid.

The two informations were moved in arrest of judgment; and after several solemn arguments,

HOLT, *Chief Justice*, delivered the opinion of THE COURT this Term, that both the informations were naught, and judgment ought to be arrested.

THE FIRST is not good, because it does not appear what authority they had to choose a bailiff. If people have a lawful authority to choose a member of a corporation, and *above two* come with clamour and noise to disturb them, it will be a riot (*a*), and it is a trespass; so it is of any franchise, dean and chapter, &c. (*b*); but in this case it does not appear that they had authority (which should have been shewn), either by *charter* or *prescription*. It is their having a right to elect that makes this an unlawful act. If they had no right, it would be no riot; but their having a right, and the defendants acting in opposition to this, in a tumultuous manner, makes it a riot; but here the plaintiffs right does * not appear (*c*).

* [116]

Therefore judgment must be arrested on the first information.

An indictment against divers persons, charging "that they unlawfully, riotously, and routously assembled to the disturbance of the peace, and with force and arms the door of a certain house, called the Guildhall of the borough of *B. broke, &c.*" it is bad, for it ought to have stated *whose house* it was. Then as to THE SECOND INFORMATION, it is ill; because it does not shew whose house it was. It is said they broke open the door *cujusdam domus*. It is very well known that in a declaration, it would not be good to say that he broke open the door *cujusdam domus*; but it must be *ejus domus*, to make it appear to be the house of him that brings the action. Indeed in an indictment for stealing a horse, it has been held well to say *equum cujusdam ignoti*, because it appears that it is not his own; and there the indictment well lies (*d*). But to make a riot, there must be an assembly, and an unlawful act done. It has been objected, that it is said to be in "THE GUILDHALL of the borough," and that would be tantamount, and like the case of a riot in a church. To which I answer, FIRST, That it does not appear to be the Guildhall of the borough; it only says "*vocat. GUILDHALL*," which is not enough, for it does not describe the thing. And besides it should have been in *Latin*, according

(a) But see 1. Vent. 251. and 2. Hawk. P. C. ch. 65. f. 1.

(b) See Year Book 29. Edw. 3. pl. 74. Register, 103.

(c) Rex v. Vaws, 1. Mod. 24.

Rex v. Bernard, Comb. 416. Rex v. Routledge, Dougl. 537.

(d) 2. Hale P. C. 181. 290. Staundf. P. C. 25. 96. Dyer, 99. Dalton, c. 103. 1. Hawk. P. C. 7th edit. 216.

according

Trinity Term, 6. Queen Anne, In B. R.

according to the statute 36. *Edw.* 3. c. 15. (a); otherwise it stands for nothing, *Osborn's Case* (b). And then taking it that "Guild-
" hall" is left out; it is no more than if it had been said "they
" broke the door *cujusdam domus*."

THE QUEEN
against
SOLEY
AND OTHERS.

SECONDLY, If it had been sufficiently described to have been
" the Guildhall of the borough of *Bewdley*," yet it might not be
THE GUILDHALL of those people thus assembled; for boroughs
may belong to lords of manors; many boroughs are manors, and a
Guildhall may belong to the lord of a manor.

The Books are obscure in the definition of riots. I take it, it is
not necessary to say they assembled for that purpose, but there must
be an *unlawful assembly*; and as to what act will make a riot, or
trespass, such an act as will make a trespass will make a riot. If a
number of men assemble with arms, *in terrorem populi*, though no
act is done, it is a riot (c). If *three* come out of an ale-house and
go armed, it is a riot (d). Though a man may ride with arms,
yet he cannot take two with him to defend himself, even though
his life is threatened (e); for * he is in the protection of the law,
which is sufficient for his defence.

* [117]

It has been objected, that in this information it is not said *in
terrorem populi*. To which I answer, that in this information it is
well without it; for in those riots which are riots without any act
done, as going armed, &c. it must be said *in terrorem populi*; but
when an act is done, it is otherwise. *Sir Robert Atkins's Case* is no
riot, because he went to claim a right (f). If several, thinking
they have a right to elect, meet to assert their right, if they do not
do it in a violent manner, it is no riot. If a *convenient* number go
to claim common, which is inclosed, and they pull down the in-
closure, it is no riot; because they go under a claim of right (g).
It is not necessary to say (in an information) that they assembled
with an intent to commit a riot; for to say they assembled "*riotosè*
"*et routosè*," and committed an *unlawful act*, is sufficient, for that
is a riot.

HOLT, *Chief Justice*, delivered this as the opinion of THE
COURT; and thereupon judgment was arrested upon both infor-
mations.

(a) See 4. *Geo.* 2. c. 26. and 6. *Geo.* 2.
c. 14.

(e) See 2. *Hawk.* P. C. 7th edit.
page 20, 21.

(b) 10. Co. 130.

(f) 3. *Mod.* 3. 2. *Show.* 236.

(c) *Hob.* 91. But see 2. *Hawk.* P. C.
7th edit. 56.

Tremain, 230.

(d) *Year Book* 3. *Hen.* 7. pl. 1.

(g) 2. *Hawk.* P. C. 7th edit. ch. 65.
f. 6.

May against Horfe.

Case 178.

A. CALLED B. "bastard;" B. and his mother libel in the
spiritual court for defamation, *viz.* for calling him "a bas-
" tard," and his mother "a whore," by implication.

If A. call B. *bas-*
tard, both B.
and his mother
may libel A. in
the spiritual court; B. for the *express*, and the mother for the *implied* slander.—2. *Roll. Abr.* 292.
Carth. 498. *Str.* 471. 545. 4. *Burr.* 2032. 6. *Com. Dig.* "Prohibition" (G. 14.).

Trinity Term, 6. Queen Anne, In B. R.

MAY
against
HORSE.

RAYMOND *for the defendant* argued, that upon a libel in the spiritual court for these words, "Thou art a son of a whore, and thy mother is a bitch," a prohibition was granted, because the latter words made the former nonsense (a); so here, for the woman appears to have a husband. But he admitted, that for calling "whore," without other words, a prohibition was denied; for that is merely of spiritual consufance.

But PER CURIAM, According to the case of *Vincent v. Apley* (b) the mother may in this case well libel for the scandal by implication.

And a prohibition was denied.

(a) Lownds v. Herbert, 2. Roll. Abr. 296. cited in the case of Vincent v. Alpy, 3. Lev. 119. But see Ferguson v. Cuthbert, Stra. 823. Carlisle v. Mapledoram, 2. Term Rep 473.
(b) 3. Lev. 119. See Hoskins v. Lee, ante, 112.

* [118]

Case 179.

* Lady Herbert against Shaw.

A letter written by the father of a plaintiff to every particular juryman, requesting his attendance on the trial, and professing that he will take it as a great obligation to himself, &c. is not a ground for granting a new trial, if the defendant had sufficient notice of such a letter having been written to enable him to move for a trial at bar.

S. C. ante, 111.

UPON AN ISSUE joined, in an action between *Lady Catharine Herbert*, daughter of the *Duke of Leeds*, and the *Fishermen of Milton*, a letter was written by the *Duke of Leeds* to every particular juryman, wherein he desires their appearance at the trial, and concludes his letter in these words, "Which I shall take as a great obligation, particularly from yourself, and shall be glad of an occasion to shew how much I am, SIR, your humble servant."

Upon which the defendant moved for a new trial.

MR. CONYERS argued, that none but the parties themselves can solicit a juryman to attend, &c. and cited *Moor*, 815. *Co. Lit.* 369. 2. *Inst.* 484.

NORTHEY *for the plaintiff* said, that the duke being father to the plaintiff, it could not be maintenance, &c. (a).

RAYMOND also *for the plaintiff* said, that it was the defendant's neglect, in not discovering the letter before the trial, and making his challenge thereupon, since it appears that they knew of it before, and probably kept it by them as an after-refuge, in case the trial went against them, as it did: however, the most they can make of it is but maintenance, which is not a sufficient cause to grant a new trial, though *embracery* (b) is.

POWELL, *Justice*, said, he remembered a case in the court of common pleas, where a stranger wrote to a juryman to consider that the plaintiff was a poor man; for which a new trial was granted, and the writer taken up and committed; but here this seems only

(a) 2. Hawk. P. C. ch. 83. f. 26. 2. Hawk. P. C. ch. 85. f. 1. *Croft v. Fenwick*, 7. Med. 156.
(b) *Co. Lit.* 369. *Moor*, 815.

Trinity Term, 6 Queen Anne, In B. R.

an invitation, and an endeavour for a full jury to appear, in order to avoid *a tales*; and a man may write in behalf of his daughter. But the doubt with me is on the compliment here paid to the jurymen by so great a man as the *Duke of Leeds*. And he thought the fact hardly justifiable even in a father.

LADY
HERBERT
against
SHAW.

This case was argued in *Easter Term* last, and likewise in this Term:

And now it was resolved by HOLT, *Chief Justice*, POWELL, POWYS, and GOULD, *Justices*, that no new trial should be * granted; because the defendant, having notice of such a letter long before the trial, might have moved for a TRIAL AT BAR, which the other side had offered to consent to: But taking the letter as it is in itself, it is of dangerous consequence; for it is a temptation to the jury to be partial, and takes off their indifference. But secondly, if a party have cause of challenge, and know of it time enough before the trial, if he do not challenge, Note. he shall not have a new trial; *contra* if he has not timely notice of it. The party himself cannot give a jurymen money to appear; for it cannot be supposed that he will hire him to give a verdict against himself.

* [119]

The motion was denied.

And NOTE, HOLT, *Chief Justice*, in delivering his opinion cited a case in the time of *Edward the Third*, where a new trial was granted, because a great lord concerned in the cause sat upon the bench at the trial.

Hardwick against Gamball.

Case 180.

A SPECIAL VERDICT finds, a settlement in consideration of natural love and affection to himself for life; then on trustees to preserve contingent remainders; remainder in tail male, "PROVIDED if the tenant for life die without issue male of his wife, and having daughters, the trustees to stand seised for thirty-one years, with intent to raise such and such legacies to the daughters." "PROVIDED ALSO, that if the next issue male in remainder, within five years, pay the legacies, that then the trustees should stand seised to such issue male as should pay the legacies, with remainders over."

Limitation on a condition precedent of a contingent remainder, is good.

The tenant for life died without issue male or female.

It was objected, that if the term never accrued, the remainders are void. 3. Cro. 465. Dyer, 34 b.

HOLT, *Chief Justice*. Though the contingent term never arose, yet the remainders are good, if the precedent estate to the term for years be sufficient to support the remainders.

* EYRES argued, that this remainder can never arise, it being a condition precedent, and it is not found that the legacies are paid; and that the remainders are void in their creation. If the first remainder

* [120]

Trinity Term, 6. Queen Anne; In B. R.

HARDWICK
against
GAMBALL.

remainder be contingent, all the others subsequent must be contingent. There must be an intermediate time betwixt the payment of the legacies, being precedent to the vesting of the remainder, and so void, it not vesting *eo instanti*. It was said, that the first remainder was nonsensical, viz. that if he died without issue male, that then his next issue male in remainder, &c. whether the term arise or not, the law to us is the same. If the condition be impossible, no estate can grow thereupon; and neither the act of God, nor the party, can dispense with this condition, if it be precedent.

Issue male taken
for heirs male.

HOLT, *Chief Justice*. The payment of the money was to let the issue male into possession, notwithstanding the term; and no payment was intended, unless there was a dying without issue male, leaving daughters. The clause, "and for default of issue male, remainder to the issue male," should have been, "heirs male in remainder," and then there had been no doubt.

And IT WAS ADJUDGED, that the remainder was good, and well vested.

Case 181.

Prime against Mason.

A *scire facias*
made returnable
on Sunday, is
void.

SCIRE FACIAS.—Demurrer to the first writ, because it was returnable "*die Lunæ in tres septimanas Sanctæ Trin.*"

Sellon's Pract.
13.
6. Com. Dig.
"Temps"
(B. 2.).
6. Com. Dig.

PER CURIAM. It is a void writ; for there is no such day, it being on a Sunday, and so it is not a *miscontinuance* to be helped by the *Statute of Jeofails* (a); and it being a void writ, the Court *ex officio* ought to take notice of it, without being pleaded in bar, and ought to quash it, and so there is no writ in being (b).
"Return" (C. 1.).

(a) 32. Hen. 8. c. 30. and 4. & 5. An. c. 16. Rex v. Miden, 1. Stra. 61. Launder v. Cripps, 2. Stra. 947.
(b) Rodd v. Evans, 3. Keb. 260. Morris v. Fletcher, Cro. Car. 53. Courtney v. Phillips, 1. Lev. 196. Gage's Case, 5. Co. 45. Harvey v. Broad, 6 Mod. 150. 196. S. C. 2. Salk 626. Davy v. Slater, 6. Mod. 250. Rex v.

Gumley, 2. Stra. 811. S. C. Bar. K. B. 74. S. C. 2. Ld. Ray. 1528. Whitmore v. Wheeler, 1. Show. 60. Cornwallis v. Hoyle, Fort. 373. Campbell v. Cummings, 2. Burr. 1187. Swan v. Broome, 3. Burr. 1595. 1. Bl. Rep. 496. 526. Leveridge v. Plaittow, 2. Bl. Rep. 29.

* [121]

Case 182.

* Anonymous.

Where a remainder in fee is not barrable by tenant in tail. Ante, 19. 61.

7. Mod. 18.
Cro. Eliz. 718.
Co. Lit. 204.

TENANT FOR LIFE, remainder in tail, remainder in fee: tenant in tail levies a fine; this has for ever hindered the tenant for life, and remainder in tail, from destroying the remainder in fee; because the fine has turned his estate into a *base fee*, and has destroyed all privy of estate: so that if tenant for life, and remainder in tail, would make a tenant to the *præcipe*, yet they cannot vouch the remainder-man in fee, without he will voluntarily enter into it (a).

(a) See Leech v. Cole, Cro. Eliz. 670. 2. Roll. Abr. 495. 3. Co. 6.

The

Trinity Term, 6. Queen Anne, In B. R.

The Queen against Harris.

Case 183.

INDICTMENT for entering his close, and cutting down several trees *ad tunc et ibidem crescentes, de bonis et catallis* of the husband and wife.

The exception, that trees growing could not be goods and chattels.

HOLT, Chief Justice. Read the indictment, and see if it say *crescentes*: and it did not say so.

But **PER CURIAM**, "*De bonis et catallis*" shall be void, as if not inserted, and the indictment is good without them: so

Judgment was given for the queen.

In an indictment for entering a field and cutting down trees, the words "*there growing, the goods and chattels, &c.*" may be rejected as surplusage.

S. C. ante, 113.

S. C. Holt, 352.

Brunker against Cook.

Case 184.

EJECTMENT was brought for lands in *Kent*, on the demise of *Francis Bokenham*; and, on not guilty pleaded, there is a special verdict; wherein the jury find, that *William Bokenham*, esq. being commander of her majesty's ship *THE GRAFTON*, on the third day of *May* 1692, made his last will and testament in writing, which they find in *hæc verba*: He writes, that he was then bound out to sea, &c. and says, "I do hereby give, devise, and bequeath to my well-beloved wife, *Frances Bokenham*, all such sum and sums of money as now is, or hereafter shall become due to me from their majesties for my own and servants service, either by sea or land: As ALSO such sum and sums of money, lands, tenements, goods, chattels, and estate whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me: And I do hereby nominate and appoint her the said *Frances Bokenham*, my well-beloved wife, to be the whole and sole executrix of this my last will and testament." They find, that *William* the testator, at the time of making this will, was not seised of any lands in the county; but afterwards, by deeds of lease and release, dated the twentieth and twenty-first days of *March*, in the year of Our Lord 1700, *Sir George Wheeler* and others, being seised in fee of the lands in the declaration particularly mentioned, conveyed the same to the said *William Bokenham* the testator, and his heirs, by virtue whereof he became seised. They find, that the lands are held in socage, and are of the nature of *gavelkind*, and devisable by the custom of *Kent* (a); and that some time afterward

A devise of "all my lands, tenements and estate, whatsoever, of which I shall be possessed or invested at the time of my decease," will not pass an estate purchased after the making of the will.

S. C. ante, 106.

* [122]

S. C. Fitzg. 225.

S. C. Salk. 237.

S. C. Holt, 236.

243. 246. 248.

746.

S. C. 2. Eq. Ab.

295.

S. C. 1. Bro.

P. C. 199.

(a) That gavelkind land is devisable by the custom of *Kent*, see *Noy's Maxims*, 24. *Brown v. Brookes*, 2. Sid. 154. *Launder v. Brookes*, Cro. Car. 561. *Hammond v. Thornhill*, Stiles, 476. *Wiseman v. Cotton*, 1. Sid. 77. 135. *Ray*, 59. 76. 1. Lev. 79. *Atkin v.*

Bokenham, post. 148. *Fitzg.* 233. *Lambard's Perambulation of Kent*, 402. *Fitz. N. B.* 198. And it seems that this custom is not confined to the county of *Kent*, *Taylor on Gavelkind*, 110. *Robinson on Gavelkind*, 242.

William

Trinity Term, 6. Queen Anne, In B. R.

BRUNNER
against
COOK.

William Bokenham died, the devisee entered, and the heir at law entered upon her.

The question between them was, Whether these lands do pass by the will of *Captain William Bokenham*, or not?

HOLT, *Chief Justice*, delivered the opinion of the whole Court. We have considered of this case all together, and we are all of opinion, that the will, as to these lands, is a void will, and that the lands do not pass thereby, but that judgment ought to be for the defendant, the heir at law. We agree, that the words of the will are full and comprehensive enough to pass all these lands, had he been seised of them at the time of making this will; and we hold, they cannot by law pass, on this account only, because the testator was not seised of these lands in the year 1692, at the time of making the will; though perhaps it might be his intention and design to have them pass. The case is no more than this: A man makes his will, and devises all his lands that he shall have at the time of his death; and after that he purchases lands, and * dies without republication, we hold that is a void devise; for a man cannot devise any lands but what he has at the time of making the will (a). And if it be of lands devisable by the custom, it is the same thing as of lands devisable by the statute. A will, be it by custom or statute, is still a disposition of the estate and lands he then has; but no man can bequeath lands or estate which he has not at that time; and though a will do not take effect to transfer the estate until the death of the testator, yet it is a will and disposition of his estate, even at the time of making such will; for from that time it is a will, and a disposition of what he devises away. There is no act between the making of a will and the death of the testator, necessary to be done to make this a perfect and complete will; no writing, no publishing, nor any other act whatsoever; it is subject indeed to a revocation, during the testator's life, and is to take effect only from the time of his death; but it is a will, and a disposition of the estate bequeathed from the time of the making thereof. Wheresoever there is a disability in the testator, at the time of making the will, though that disability be actually removed before his death, yet the will will still be a void will, because he had no ability at that time. Suppose an infant make a will, and devise land during his infancy; or a *feme covert*, in the life of her husband, make a will, and dispose of land thereby; though the *coverture* and *infancy* be afterwards removed, and the husband die, or the infant come of age; yet if either of the devisors die, without a new making or publication of the will, this is a void will (b), because of the original disability; and though they should live many years after such disabilities are removed, yet the removing those disabilities will not do without a new publication, or making a new will. Now those are personal disabilities, but this a real one; he had nothing in this case to give or dispose of; so here is a removal of a

(a) *Brett v. Rigden*, Plowd. 342.

(b) 1. Sid. 162.

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real disability; and shall the removal of that be more effectual to make it a good will, than removing a personal disability? No surely. * It is said in the case of *Force v. Hembling* (a), that the making of the will is not the will, but only the commencement of it: the meaning of that is only, that it does not transfer the interest and property of the thing devised; but still it is his disposition until he revoke it. Now what commencement has this will as to these lands? It cannot have a commencement from the time of making the will, because the testator had not the estate at that time. When then would you have this to be a will? Must you stay until he has purchased lands to make this a will? Suppose he does, can a precedent devise extend to them? Now his act of purchasing those lands, and his act of disposing of them, are two different things, and are of different natures. You must suppose that *eo instante* he purchases: he makes his will, though made long before, which is absurd and repugnant. The law of *England* is plain as to this point, by all the precedents of wills; and the law is the same, both of lands devised by custom, as well as by the statute. There is no will that I can find in any plea or entry, but it is said, that the testator was seised in fee of such and such lands, and that being so seised he made his will such a day, and did devise, dispose and bequeath so and so; which words plainly shew that it is absolutely necessary he should be seised in fee at the time that he makes his will; and of this there are multitudes of authorities. I shall name a few only: In *Coke's Entries* (b), and in *Rastal* (c), there is a precedent of a will of lands devisable by custom, that the testator was seised in his *demesne as of fee* (d). Though the forms of pleading do not make the law, yet constant pleading of a thing in such a manner is a great evidence of the law; and this argues the necessity of the testator's being seised in fee at the time of making the will. But it is objected, that lands devisable by custom differ from lands at common law, because that they are devisable as *goods and chattels*; and appeal to the custom itself, set forth in the writ of *ex gravi querela* (e). Now it is said, that by this custom it is lawful to devise lands and *tenements as chattels, though the testator has not the possession of them at the time of making the will; and that a man may dispose of his chattels and personal estate, that he shall for the future acquire at any time after the making of his will, to the time of his death; and shall therefore dispose of these customary lands in the same manner. In answer to this, I desire the custom in that writ set forth may be well considered, and then it will appear plainly, that the custom is not general, that a man so qualified may devise *lands and tenements*, as he may *goods and chattels*; but it is *tenementa sua*, they must be *sua* before he can dispose of them; they must be his property before he can devise them away. Now if they be not *sua* at the time of the devise, then he is out of the custom, and his will cannot be affected by it. It is true, personal

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(a) 4. Co. 60.

(b) Co. Ent. 602. 664.

(c) Rastal Ent. 274.

(d) See Year Book 34. Hen. 6. pl. 6. a.

(e) Fitz. N. B. old edition, page 199.

estate

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estate and chattels may, by the common law, be disposed of before he has purchased, or had the possession of them; and there are many cases that make this out (a); but there is a great deal of difference between *real estate* and *personal estate*; for personal estate and chattels are transient and fleeting, and not at all fixed and permanent, as lands are. Perhaps the greatest part of a man's estate is in goods to-day, and he may have a mind to turn those into money to-morrow; now would it not be hard that he should make a new will on every alteration; for this the necessity of dealing and traffic in the world would require a man to make a will every day, if he could not dispose of his personal chattels, because they have undergone some alteration; this would be the greatest perplexity in the world. But on the other hand, lands continue the same every day, and will so to the end of the world. And as to real estates, there is time and opportunity to make settlements as he thinks fit; but of personal estate, which is under a continual variation, it is quite otherwise in reason. Again, as to personal estate; the law has not appointed any person to succeed therein, where there is no will, as it has *the heir* in case of lands, but only now by act of parliament, there is an administrator to be appointed (b); * but at common-law it was not so (c); and where the party testator appoints an executor, he takes under his right of disposition; when he is appointed executor, he takes all, as being named executor; and when the testator gives legacies out of it, it is in a manner a direction only to the executor how he shall administer; for legacies by the will do not pass to legatees in the same manner as a real estate; because, notwithstanding such devise, the property is in the executor, and not in the legatee, until the executor do consent to the legacy (d); but in a real estate the lands pass immediately to the devisee (e). This makes a great difference. The law has appointed a person in one case to succeed where no will is, which is the heir; but in the other case at common law, no person is appointed to succeed to the possession of a personal estate, but it is left to the testator's discretion. Suppose the case was of a devise of a *real chattel*, and a man should devise a term of years that he had not at the time of the devise, but purchased some time before his death; I doubt whether that would be good; though this be not the case, nor is it necessary that I should give any opinion in it, yet I make a great doubt of it (f). Suppose for the purpose one takes a college lease, and another makes his will, and should devise that

(a) See *Cayre v. Gayre*, 2. Vern. 558. *Sayer v. Sayer*, Prec. Chan. 392. *Masters v. Masters*, 1. Peer. Wms. 424. *Wind v. Jekyl and Alibone*, 1. Peer. Wms. 574. *All Souls College v. Codrington*, 1. Peer Wms. 597. *Dean and Chapter of Christchurch v. Barrow*, Ambler, 641.

(b) By 31. Edw. 3. c. 11, where a man dies intestate the ordinary shall depute the next and most lawful friends of the deceased to administer his goods; but by 21. Hen. 8. c. 5. he may commit ad-

ministration to the wife, or next of kin of the intestate, or both. See also 22. & 23. Car. 2. c. 19. *Lord Suffolk's Case*, Cases Temp. Hardw. 9.

(c) See *Selden's Jurisdiction of Testaments*, book 2. ch. 1, 2, 3, 4. 2. Roll. Rep. 217.

(d) 1. Roll. Abr. 618. *Wentworth's Office of Ex.* 322. *Young v. Holmes*, Stra. 70.

(e) Co. Lit. III. 2.

(f) *Wind v. Jekyl*, 1. Peer. Wms. 575.

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lease away to another, and afterwards the testator should purchase that college land, subsequent to the making of his will, the question is, Whether this would be a good devise? And I am inclined to think, this would not be a good devise. There is the case of *Ashby v. Lever* (a) comes up to this matter: A man makes his will, having a college lease, or other lease, and devises this lease to *J. Stiles*, after the making of which will he surrenders this lease, and renews the lease from the said college, suppose, and then dies; the question was, Whether the devisee should have this lease? And it was held in that case, that the renewing the lease was a revocation of the will; and that the lease did not pass. This seems to be a very strong case, as to this point; and the reason* is plain, because the estate was not *in esse* at the time of making the will. In the case of *Southward v. Milward* (b), the question was, Whether a term not assented to by executors, and which passed only as an executory devise, could pass by the will of the devisee? And it was held, that it was only a possibility, and that nothing passed by will (c): and indeed how could he dispose of a term that was not his, but another man's? It is hard to imagine such a preposterous thing; but I shall not give any positive opinion therein, this not being our case. The executor must assent to a legacy, else nothing passes; for nothing can pass immediately where a term is devised. But this is enough to shew a difference between a real and personal estate; one is permanent and lasting, the other mutable and fleeting. To make a will to take effect from the purchase of the estate, is repugnant to the nature of a purchase; for the will gives it to another and his heirs, and the purchase gives it to himself and his heirs; the will gives it to his wife, and the purchase gives it to himself in fee; so that here is a perfect contradiction. Now it is to be noted, that here is no republication; for if there had been a republication, that would have done, and made those lands pass; provided that all the requisites and circumstances necessary to the making of an original will, within the statute of Frauds and Perjuries, had been observed. Suppose a man devise all his land in tail, and afterwards purchase other lands, and die before republication, those purchased lands will not pass; but if he republish the will in such manner, and with such circumstances as are necessary to the complete execution of an original will, then the purchased lands will pass as by an original will. It is said, indeed, in the case of *Brett v. Rigden* (d), that where a man devises lands in certain, as the manor of *Dale* or *White Acre*, and the deviser has nothing in the land at the time of making the devise, but does afterwards purchase the same, that such new-purchased lands shall pass* to the devisee, because his intent was manifest to pass it away: if that were law, it is full against me, but I think that case is not law; it is only a saying of *SERJEANT LOVELACE*, and the case quoted in the margin does not warrant any such thing. I thought indeed,

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(a) Goldsb. 93.

(b) March, 137.

(c) See *Selwyn v. Selwyn*, 2. Burr. 1131. and *Jones v. Perry*, 3. Term Rep.

88. that a possibility clothed with an interest is devisable.

(d) Plewd. 340.

before

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before I looked narrowly into that case, which is 39. *Hen. 6. pl. 18.* that it had been so, but there is nothing in that book to warrant it; nor is there anything like it in either of the Abridgments, either in *Fitzherbert (a)*, or *Brook (b)*. It is only a note of two Judges opinions. "NOTA," says the Book, "In the king's bench per *YELVERTON* and *MARKHAM*, if a man devise land, and is disseised after that, and then dies, the devise is void and cannot be made good;" and the reason is, because the disseisin turns it to a right, and is then only a *chose en action*, and cannot be devised away; "and therefore," says the Book, "it was held a good plea against this devise, that the devisor did not die seised of the said land." But the Book goes on further, and says, "Suppose a man is disseised, and then makes his will, and devises lands, and afterwards re-enters into those lands," it is made a question there if it be a good plea to say, that the devisor had nothing in the lands at the time of the devise. This is the case put, and the case meant, which is the ground of the preceding opinion; and it seems by that Book, that if he do re-enter, the lands shall pass. And I am of opinion, the lands will pass if he re-enter; and the reason is, when a man is disseised, and he makes a re-entry, that such entry purges the disseisin, and the disseisee, by relation to all intents and purposes, is in possession from the beginning; and for that reason, he shall have an action for the mean profits, between the time of the disseisin and bringing the action; and so is 38. *Hen. 6. pl. 27.* 19. *Hen. 6. pl. 17.* He may in such case be justly said to be seised in fee of such lands, and therefore may dispose of, and devise the same away; because the entry reverts the estate, and he is now, in consideration of law, in possession from the time of the disseisin, and therefore is intitled to the mean profits, as though he had been actually in possession all the while: but that is not this case, * for there the devisor has neither *jus in re*, nor *jus ad rem*; for the land is here purchased eight years after the making of the will. Suppose an heir who has nothing but a bare right, should, during his father's life-time, make a will, and devise all his lands that he should have at the time of his death; would the land that came to him by descent from his father, pass by the devise? No surely. But then suppose a man make a will of lands in reversion, expectant on an estate-tail, or estate for life, and before his death the tenant for life or in tail dies without issue, these lands will pass, though a reversion only at the time of making the will; because he is seised at that time as much as he can be; and it is a certain present interest, though to commence *in futura*, and all the estate that he could give he intended him. There was a case in my LORD BRIDGMAN's time of *Davis v. Kemp (c)*; it was a devise of lands to two persons and their heirs, and one of them died during the life of the testator; and the question was, Whether the survivor should take the whole or not? And it was held he should; which plainly shews it was a will and disposition from the time of making it.

See 1. Chan.
Cases, 191.

(a) Fitz. Abr. "Devise," 27. a.
(b) Bro. Abr. "Devise," 15.

(c) Carter, 2. 1. Eq. Abr. 216.

Supposing

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Supposing *A.* has a manor, and makes his will, and devises this manor, and before the death of the testator, a tenancy escheats to the lord, and after that the testator dies; the question is, Whether the escheated tenancy shall pass? And I hold, that the tenancy, that escheated between the making of the will and the death of the testator, shall pass; because the manor is devised, and that is part of it; for the tenancy is not devised as a distinct thing, but as a part of that whole which he could devise. I look on it to be very plain, and to be my *Lord Coke's* opinion in the case of *Butler v. Baker (a)*, that a devise is a disposition; and that case was so adjudged in the exchequer chamber by ALL THE JUDGES IN ENGLAND, and that a custom to devise ought to be construed the same as on the statute. * Therefore for these reasons I hold, that judgment ought to be given for the defendant, viz.

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FIRST, In regard it is a will at the time of the making.

SECONDLY, Inasmuch as the testator has not power to give what he had not.

THIRDLY, The constant manner of pleading shews the necessity of the testator being seised at the time of the devise.

FOURTHLY, A devise of lands is not comparable to a devise of personal estate; because a personal estate is altering every day.

FIFTHLY, Because a devise is repugnant to the nature of a purchase: A purchase is to the devisor and his heirs, and the devise is to another and her heirs.

SIXTHLY, Because there is no case (*b*), nor authority in law, to warrant any contrary judgment.

And judgment was accordingly given for the defendant, the heir at law.

And, on an appeal to the house of lords, this judgment was affirmed (*c*). 1. Brown. P. C. 202.

(a) 3. Co. 25.

(b) *Quære*, if there is not a case in *Ventris* to this purpose? AND NOTE, that at this time there was another like case depending in the court of common pleas, and the same points debated, and afterwards adjudged, which see hereafter page 148. reported under the name of *Arthur v. Bokenham*.—NOTE to the former edition.

(c) Lands purchased subsequent to the making of the will, do not pass by the statute of Wills, *Butler v. Baker*, 3. Co. 30. *Leonard Lovie's Case*, 10. Co. 78. *Lawrence v. Dodwell*, 1. Ld. Ray. 438. *Holt*, 243. *Strode v. Falkland*, 3. Ch. Reports, 99. *Brydges v. Duke of Chandos*, 2. Vezey, jun. Rep. 427. unless the will is republished, *Bret v. Rigden*, Plow. 344. or the land has been articulated and contracted for previous to the making of the will, *Prideaux v. Gibbon*, 2. Ch. Cases, 144. *Davie v. Beardsham*, 1. Ch. Cases, 39. *Atcher-*

ley v. Vernon, 9. Mod. 78. *Lingen v. Souray*, 1. Peer. Wms. 172. *Beauclerk v. Mead*, 2. Peer. Wms. 169. *Pullen v. Ready*, 2. Peer. Wms. 590. *Whitaker v. Whitaker*, 4. Brown C. C. 31. though by express stipulation the agreement is not to be carried into execution until a future day, which is after the making of the will. *Greenhill v. Greenhill*, Prec. Chan. 320. 2. Vern. 79. *Potter v. Potter*, 1. Vezey, 437. Lands not agreed for until after the making of the will, do not pass either at law or in equity, *Langford v. Pitt*, 2. Peer. Wms. 629. *Green v. Smith*, 1. Atk. 572. *Allen v. Allen*, *Moseley*, 262. See also *Ibbott v. Cowling*, that if a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass, for he had not the fee at the time of the surrender, 6. Term Rep. 63.

Case 185.

Keeble against Hickeringill.

A decoy for wild ducks is a kind of trade, and therefore an action on the case will lie for maliciously preventing the wild ducks from coming to the decoy.

S. C. ante, 73.

S. C. 3. Salk. 9.

S. C. Holt, 14-17. 19.

* [131]

HOLT, Chief Justice, delivered the judgment of the Court.—The declaration is, that the plaintiff was lawfully possessed of a close of land, and a decoy therein; and that the defendant knowing it, and intending to deprive him of the benefit thereof, and to hinder the ducks from coming to the decoy, did, on divers times, shoot off and discharge guns, &c. maliciously; and a verdict is found for the plaintiff.

FIRST, This decoy is a benefit to the plaintiff, and in nature of a trade; and there is the same reason that he should be repaired in damages for his decoy, as for any other trade. It is true, there may be a *damnum sine injuriâ* (a). If a man set up the same trade as mine in the same town, this is a damage to me, but *it is *sine injuriâ*; for it is lawful for him to set up the same trade if he please (b). But this action is brought for disturbing the wild-ducks coming to his decoy, and so is in the nature of disturbing him from exercising his trade; and therefore he need not set forth how many ducks, which was the exception taken at the bar (c). Also this is not like *Playter's Case* (d), which was *pisces suos cepit*, and did not say how many, nor of what nature. For in this case it was impossible to say how many, because the action is brought for disturbing them coming only to his decoy.

SECONDLY, The statute 25. Hen. 8. c. 17. enumerates what is *wild-fowl*; so that the law takes notice of wild-fowl, and shews what it is; and we must take notice of it too, or else how can we obey this law?

THIRDLY, There is a difference between this case and that of franchises; for if I have a fair, market, ferry, or the like, granted to me, no man else shall use another to my damage; for these are of a public nature, and divers persons besides the grantee have an interest in them; and if I do not repair my ferry, &c. I am indictable; and therefore no man shall (erect and) use another ferry, &c. to my damage. But any man may freely use a private franchise, as a park, warren, way, &c.

FOURTHLY, This case is not like *Playter's Case*, about taking fish out of a pond, &c.; for in that it was trespass to have damage for the thing taken; and therefore it was necessary to set out how many, and of what nature. But this action is trespass on the case, to have a recompence for a *consequential damage* or injury; and is for hindering me from exercising my private right; for those ducks might have come to my decoy to my benefit, which were here hindered, to my damage, &c.

(a) Year Book 11. Hen. 4. pl. 44. or 47.

(b) Year Book 23. or 19. Edw. 3. fo. 18.

(c) See Cro. Jac. 123. 126. Owen, 109.

(d) 5. Co. 35.

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And according to this he cited a case in one of the *Year-Books*, where an action was brought by the owner of a market, for hindering horses being brought to the market, and adjudged that it well lay, though it did not appear in certain that anybody would have brought them. And so where a person is hindered from going to a fair, market, &c. for it is injurious to hinder a man from going where he has a right to go (a).

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against
HICKER-
INGILL.

* [132]

Judgment was given for the plaintiff (b).

(a) *Quare*, If not so where one is hindered from doing what he has a right to do, though no special damage.—NOTE to former edition.

(b) See S. C. Holt, 20.

Anonymous.

Case 186.

SIR EDWARD NORTHEY moved for an information against a man, chosen of the common-council of Bristol, who refused to accept the office; and suggested, that in case he might refuse to accept it, the corporation would soon be at an end. He also said, that the sheriffs were always chosen out of the common-council; that the Court would take notice of a common-council-man as of a public officer; and that a corporation is a part of the public government.

The Court will not grant an information for refusing to accept the office of common-councilman; but the corporation may, by a by-law, inflict a penalty for such refusal.

HOLT, Chief Justice. That is *quoad* the place where they have a power as a corporation to make by-laws. They should make a law to inflict a penalty on him who refuses; and this is the proper way (a).

S. C. post. 142.
1. Roll. Abr. 363.
5. Co. 64.
5. Mod. 319.
2. Mod. 302.
2. Stra. 1130.
1. Burr. 402.
1. Salk. 349-397.

Sed adjournatur.

(a) See Rex v. Vanacre, 5. Mod. 441.
1. Salk. 142. Mayor of Wokingham v. Johnston, Cases Temp. Hardw. 284.

Vintners Company v. Passey, 1. Burr. 235.

Anonymous.

Case 187.

HOLT, Chief Justice, and ALL THE COURT agreed unanimously, that if an inferior court has jurisdiction over the cause of action, no prohibition ought to go, upon a suggestion, that the cause of action arose out of the jurisdiction (a); but you ought to plead to the jurisdiction (b), and if they refuse such plea, then move for a prohibition.

If an inferior court has cognizance of the action, a prohibition will not lie on a suggestion that the cause of it arise out of the jurisdiction.

And HOLT, Chief Justice, said, there have been cases to the contrary, but the law is now settled otherwise; and if a person plead in chief, he shall never assign this for error, if such inferior court have jurisdiction of the thing (c).

2. Lev. 230.
1. Sid. 331.
Salk. 548.

(a) Symes v. Symes, 1. Burr. 813.
Blackiere v. Hawkins, Dougl. 378.
Daryl v. Colens, Dougl. 378. *notis.*
S. C. 1. Term Rep. 552. Caton v. Burton, Cowp. 330. Leman v. Goultry,

3. Term Rep. 3. Velthafen v. Ormsley,
3. Term Rep. 315.
(b) Rowland v. Veale, Cowp. 20.
(c) Full v. Hutchins, Cowp. 424.

Case 188.

* Rich against Wilks.

Covenant and breach assigned after the declaration.

A COVENANT was, that the defendant should dance, sing, and act under the society of comedians, and obey orders; and should act and be assisting to no other theatre but what was appointed by *Mr. Rich*. The breach assigned was, that he acted at *Oxford*, without the consent of the plaintiff. The defendant demurred to the declaration.

PENGELLY, for the defendant, excepted to the declaration:

FIRST, That it is set out with "*post hæc, &c.*" which must be construed from the filing of the declaration (or bringing the writ), and it should have been "*post confessionem indenturæ*," 1D EST, that he the said *Robert Wilks* did covenant that he, for five years after the making, would not act, &c.

SECONDLY, This breach is not well assigned, because it does not appear, that the play he acted was public; and if not so, it was no damage to the plaintiff. And the design of the covenant was not to restrain any dancing, acting, &c. unless where it drew others (to lay out their money at other play-houses) from the play-house of *Rich*.

SALKELD contra. This breach is assigned according to the covenant, and it is not material whether the acting were for gain or not. But take it to be for no gain, it is yet prejudicial to the plaintiff; for nobody will see his play, when they can see another for nothing.

HOLT, Chief Justice, and POWELL, Justice. That "*quod post hæc non ageret, &c.*" in the declaration should have been "*quod abinde non ageret, &c.*" Now "*post hæc*" was right in the recital of the covenant, but wrong in the declaration; because "*post hæc*" must be taken to be after the present time; so that the breach is laid to be after the declaration.

But it was adjourned; though THE COURT thought it could not be made good.

Case 189.

* Love against Dr. Bentley.

Parishioners have right to view parish-books.

THE SOLICITOR GENERAL moved for a *mandamus* to the parish of *St. Clement's* in *Cambridge*, to let the defendant have the sight of the parish-books.

It was in an action brought for a false return to a *mandamus* for *Dr. Bentley* to swear the plaintiff a church-warden.

EYRES contra. This is not like the case of a corporation, which is of a public nature (a), and cited a case to that purpose.

(a) *Snow v. Cutler*, 1. Keb. 567. *Gwin*, 1. Stra. 401. *Goodwin v. Spray*, Rex v. *Motherell*, 1. Stra. 93. Rex v. 1. Term Rep. 466.

HOLT,

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HOLT, *Chief Justice*. They ought to have a sight of the books; and this case is not like the case cited by Mr. EYRES, which concerned the title of an estate; and yet in the case of a copyhold, every copyholder has an interest in THE ROLLS (a); so here, every parishioner has a right to the parish-books.

LOVE
against
DR. BENTLEY.

And THE COURT ordered copies of the books to be given (b).

POWELL, *Justice*, said, such copies would be good evidence, *i. e.* against the plaintiff, but not for him, as I apprehend; because in this case he has the custody of the books themselves, and may produce them in evidence if he pleases (c).

(a) Bull. N. P. 247.

(b) In all cases where the original would be evidence if produced, and is of a public nature, an immediate sworn copy thereof is admissible in evidence, *Lynch v. Clarke*, 3. Salk. 154. For as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhib-

ited at different places at the same time, *Gilb. L. E.* 48. *Tillard v. Shebbear*, 2. Wils. 366. *Birt v. Barlow*, Dougl. 171. And that parish-books are of this public nature, see *Stainer v. Droitwich*, 1. Salk. 281. and conclusive evidence as to the matter of which they are the proper registers, *May v. May*, 2. Stra. 1073.

(c) Anonymous, ante, 111.

Squire against Yendon.

Case 190.

IN AN ACTION ON THE CASE the plaintiff declared, that the defendant being indebted to the plaintiff in ten pounds for horse meat, in consideration thereof, promised to pay to the plaintiff as much as he should deserve. And after verdict for the plaintiff,

A sum certain a good consideration for an uncertainty.

JOHN FORTESCUE, *in arrest of judgment*, moved, that a sum certain could not be a consideration for an uncertainty. Suppose the jury had given eleven pounds ten shillings, that could never be a good consideration for more.

Style, 320.
1. Roll. 28.

But PER CURIAM, It is well enough, and the plaintiff has election to bring his action upon either.

* [135]

* Savage against Walthew.

Case 191.

IN AN ACTION ON THE CASE by a carrier against his servant for losing goods, &c.

If the servant of a common carrier accidentally lose goods intrusted to his master to carry, the master cannot maintain an action against him for the value, unless he

THE EXCEPTION taken was, That this action lies not, except it appear that the carrier had received damage by being sued; for this action lies only in respect of the damage the master sustained (a).

It was further objected, that if this action lies, the defendant might be twice charged, *i. e.* by the master and by the owner.

can prove negligence, and has paid the money to the owners.

(a) See the *Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53. that the sheriff may bring an action for an escape against a prisoner before he has paid the money.

See also *Salteston v. Payne*, Cro. Eliz. 237. and *Cole v. Thorn*, Cro. Car. 186. *Atherton v. Harward*, Cro. Eliz. 349.

Trinity Term, 6. Queen Anne, In B. R.

SAVAGE
against
WALTHREW.

HOLT, *Chief Justice*. It is not so, unless there be an actual conversion; for *the owner* of the goods has an action against *the servant* only in case of a conversion. And the master has a special property in the goods, and may maintain trover; and the master is liable to the owner, by reason he was intrusted by him. Besides, there ought to be a negligence shewn in the servant to make him liable to this action, for this amounts only to a *bailment* of goods, where if thieves break in and steal them, he shall not answer it.

And judgment *nisi* within three days.

Case 192. Modely and his Wife, Executors, against York.

In *assumpsit*, the executor shall pay costs, where money was received after testator's death. IN an *assumpsit* by an executor, for money received after the death of the testator, if the executor be nonsuit he shall pay costs; for the law gave this privilege to executors, of not paying costs, only where the cause of action accrued in the testator's life-time; and there, because it could not be supposed that the executor was consulant, or privy to the acts of the testator (a).

(a) That an executor may support an action in his own right for money had and received after the death of the testator, see *Walter v. Lewis*, 2. Ld. Ray. 1215. *Marsh v. Jennerly*, Andrews, 359. *Jenkins v. Plumb*, 6. Mod. 91. 1381. And that wherever an executor or administrator can bring the action in

his own right, yet brings it as executor or administrator, and is non-suited, he shall pay costs, see *Portman v. Camr*, 1. Stra. 682. *Jones v. Wilton*, post. 256. *Marsh v. Yelowly*, 2. Stra. 1106. *Cockerel v. Knyfton*, 4. Term Rep. 277. *Goldthwaite v. Petrie*, 5. Term Rep. 234.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt. } Justices.

Sir Henry Gould, Knt.

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* The Queen against Simmons.

* [136]

Case 193.

MOTION to discharge a person committed by the justices at their sessions, on the 18. *Eliz. c. 3.* The statute says, "That two justices of the peace, in, or next unto, the parish within which such bastard shall be born, shall take order for the punishment of the mother and the reputed father of such bastard, as also for the better relief of the parish." AND THAT "the said justices shall take order for the keeping of every such bastard-child, by charging such mother or reputed father with the payment of money weekly, or other sustentation for the relief of such child." AND THAT "if after the same order by them subscribed under their hands, either the mother or reputed father, upon notice thereof, shall not perform the said order, THEN every such party so making default, in not performing of the said order, to be committed to ward to the common gaol, there to remain without bail or mainprize, EXCEPT he, she, or they shall put in sufficient surety to perform the said order, OR ELSE personally to appear at the next general sessions; AND ALSO to abide such order as the said justices of the peace, or the more part of them, then and there shall take in that behalf; AND THAT, if at the said sessions the said justices shall take no other order, then to abide and perform the order before made, as is aforesaid."

Order of bas-
tardy.

2. Bulst. 341.

Michaelmas Term, 6. Queen Anne, In B. R.

THE QUEEN
against
SIMMONS.

IT WAS OBJECTED, that *the justices*, and not *the sessions*, have the power in this case to commit, &c.

POWELL, *Justice*. Suppose he gives security to abide the order of two justices, and that this order is confirmed at the sessions, cannot they commit him for disobeying it?

HOLT, *Chief Justice*. No they cannot; they must proceed upon the security.

ANSWER. But here is no security given. In this case the man kept out of the way, so the two justices could neither commit him nor take security of him; but they make this order upon him, and then he appeals to the sessions, and the justices there order him to be committed.

The order was quashed;

But THE COURT bound him over to appear at the next quarter sessions (a).

(a) See 3. Car. 1. c. 4. f. 15. Smith's Case, 2. Bulst. 342. Rex v. Eve, 2. Show. 236. Reg. v. West, ante, 39. S. C. 2. Ld. Ray. 1157. Rex v. Tenant, 1. Ld. Ray. 1423. Rex v. Messenger, 1. Const's Poor Laws, 418. and the statute 6. Geo. 2. c. 3.

Case 194.

Falmouth against Strode.

The death of **I**N JECTIONMENT the case was this: The assizes began on the *Monday*, and the defendant died the day before, and yet a trial was had, and a long defence, and a verdict for the plaintiff.

17. Car. 2. c. 8.

* [137]

3. Lev. 120.

1. Sid. 131.

7. Mod. 39.

And now IT WAS MOVED, that * judgment should be arrested.

It was objected, that this is matter of fact, and not assignable after verdict, but that they ought to bring a writ of error.

HOLT, *Chief Justice*. If he had died the day the assizes began, though the cause had been tried after, the trial had been good, though he had died at one o'clock in the morning; for there is no fraction of a day (a), according to *Shelley's Case* (b); in which case my Lord Hobart said, any man, as an *amicus Curiae*, may inform the Court of such an error (c).

Adjournatur.

(a) Anonymous, 1. Salk. 8.

(b) 1. Co.

(c) Yelv. 152. Cro. Eliz. 220.

6. Mod. 143. But see Plummer v.

Webb, 2. Ld. Ray. 1415. *notis.*

The

Michaelmas Term, 6. Queen Anne, In B. R.

The Queen against Woodward, &c.

Case 195.

INDICTMENT against several, for intending to defraud *A.* of his money; stating that they threatened to send him to *NEW-GATE* by colour of a warrant, and to indict him of perjury, unless he would give them money and a note; which he did through their threats.

To extort money by means of a threat to indict the party for perjury, is an indictable offence at common law.

DARNEL urged, that this was no offence indictable, but it was over-ruled.

Then he took exceptions to the indictment:

FIRST, That it is not averred, that he had no warrant to carry him to *Newgate*,

SECONDLY, Neither is it averred, that he is not guilty of perjury. 2. *Roll. Rep.* 263.

THIRDLY, It is not averred, that any money was actually paid,

Sed Curia contra.

HOLT, Chief Justice. Every extortion is an actual trespass, and an action of trespass will lie against a man for frightening another out of his money. If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie.

Judgment for the queen.

Anonymous.

Case 196.

SIR EDWARD NORTHEY moved for a *mandamus* to the surrogate of the bishop to grant administration to *B.*

A *mandamus* lies to grant administration to the next of kin, but not to a particular person.

The case was, That administration had been * committed to one who died, and made an executor, who would have had it committed to him, and not to the next of kin to the intestate.

HOLT, Chief Justice. It cannot be, but it must be committed to the next of kin to the intestate;

* [138]

And granted a *mandamus* for that purpose (a).

(a) *Blackborough v. Davies*, Comy. Rep. 96. *Rex v. Smith*, Stra. 893. *Bar-ter's Case*, Andr. 24.

Ludlow

A bond debt due to a wife, in the character of executrix of her former husband, cannot be assigned under a commission of bankruptcy against her second husband,

THOMAS WALKER made his will, and named his wife executrix thereof; she married a bankrupt. *Browning* the defendant was indebted to *Walker* by bond, and the debt becoming due, the commissioners assigned that debt.

It was urged, that this debt is not assignable by the commissioners of bankruptcy; for it is a debt due *in autre droit*, and not to the executrix in her own right, &c. and that it is not forfeitable by her or her husband. 10. *Edw. 4. pl. 1. Keilway, 64. b. Cro. Car. 464. 1. Jones, 386. Cro. Car. 208. 218. 1. Lev. 17. Raym. 67, &c.*

Keilway, 64.
2. Roll. Abr. 58.

PARKER, *Serjeant*. The question is, Whether the commissioners can assign a debt due to the bankrupt's wife, as executrix to another? I agree it is not forfeitable by outlawry, &c. of the wife or husband; but a thing may be grantable or assignable, though not forfeitable; his grant can convey away the goods, though he cannot forfeit them. The statute enables him to grant or assign *choses in action*. Whatever the man himself can grant, the commissioners may. If a man grant "*omnia bona et catalla sua*," a term in right of his wife will pass.

HOLT, *Chief Justice*. This is a *chose in action*, and in *autre droit*, and he asked if he had any more to say.

Response, 2. *Cro. 318*. And as to this being a *chose in action*, there is no difference; for they have the same power over those as over goods, &c. *Noy, 142. Palm. 505.*

WHITACRE. There are no words in the statute 21. *Jac. 1. c. 19.* that impower the commissioners to assign the estate of another man, but of the bankrupt's only.

* [139]

* HOLT, *Chief Justice*. This in truth is the estate of the testator, and they have no authority to assign any thing whatever but the bankrupt's estate; the power the husband has of disposing of it, does not make it his until he has disposed of it.

POWELL, *Justice*. BROTHER PARKER, you have a hard case to maintain. The old Books do indeed say, if a man grant *omnia bona sua*, such things *in action* shall pass, because the property must be in somebody; but the law has been ruled otherwise since; and therefore, if he has any other goods, the statute is satisfied; and by his grant of *omnia bona sua*, none but what are really his own shall pass; and these words shall not pass away those things which would make him a wrong-doer, and in this case commit a *deceit* (a). You would have the commissioners be the testator's

(a) See the case of Knight v. Gould, Lev.

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executors, but they are only to pay the debts of the bankrupt, but not the debts of the testator.

LUDLOW
against
BROWNING.

Adjournatur (a).

(a) This case is not reported in any other book; but that assignees cannot assign property belonging to a bankrupt as an executor or administrator, see *Ex parte Ellis*, 1. Atk. 101. *Ex parte*

Marth, 1. Atk. 159, 160. *Howard v. Jemmet*, 3. Burr. 1369. *Ex parte Lewellyn*, Cooke's B. L. 168, 169. *Ex parte Lecke*, 2. Brown Ch. Rep. 596.

Tulley against The Bail of Vavasor.

Case 198.

MR. RAYMOND moved to amend a *scire facias* against bail, upon a writ of error brought on a judgment in the common pleas, where THE CLERK who had the judgment before him, in which the plaintiff's name was *James*, and the clerk had made it *Randal*, which was a variance from the record; for the judgment recorded was misrecited in the writ.

Scire facias
amended.
S. C. Holt, 58.

MR. EYRES. There was a judgment recovered against *Vavasor*, and that judgment was affirmed here with costs, *pro dilatione executionis*; and the only thing they can amend by, must be the writ of error.

HOLT, *Chief Justice*, cited a case, where a man can bring a writ of error given for himself (a).

RAYMOND. It is only *vitium clerici*, and a mere mistake in him in not pursuing his instructions; and such mistakes may be amended after a writ of error.

* HOLT, *Chief Justice*. If it be amendable at one time, it is so at another; if it may be amended before a writ of error, it may be amended after a writ of error brought (b).

* [140]

POWELL, *Justice*. A man can never bring a writ of error to reverse a judgment that is given for him; for there must be a damage, a *gravamen* recited, which cannot be of a judgment that is given for him. *Quære de hoc?*

But on the whole, THE COURT held, that the writ of *scire facias* in this case was amendable (c).

NOTE, The mistake in the *scire facias* was, the clerk had made it reciting, "that whereas *Randal* had recovered against *James*;" whereas the judgment was, "that *James* had recovered against *Randal* (d)."

(a) *Prynne v. Sloughter*, 2. Vent. 304, 105.

(b) *Poph.* 102. *Jones*, 9. 3. Lev. 361. *Ld. Ray.* 95. 116. *Strange*, 38. 787. 1227.

(c) *Hampson v. Chamberlain*, Barnes, 3.

(d) *Richards v. Simmonds*, 3. Will. 43. *Weston v. Packman*, 3. Will. 49.

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Cafe 199.

The Queen against Hurst.

An indictment will not lie where a statute points out a particular remedy.
Post. 174.

AN INDICTMENT was for keeping an ale-house without a licence.

MR. EDWARD WINNINGTON moved to quash it, because the statute of 5. & 6. *Edw. 6. c. 25.* has carved out particular penalties.

And by THE WHOLE COURT it was quashed accordingly (a).

(a) Wherever a statute creates a new offence, and prescribes a particular mode of punishing it, the method so prescribed, and not the common-law method by indictment, must be pursued, *Rex v. Marriott*, 4. Mod. 144. 1. Show. 308. *Rex v. Penfax*, 1. Bar. K. B. 127. *Rex v. Wright*, 1. Burr. 544. *Stephens v. Watson*, 1. Salk. 45. *Hartley v. Hooker*, Cowp. 524. But where new-created offences are only prohibited by a general prohibitory clause in a statute, an indictment will lie, *Rex v. Robinson*, 2. Burr. 803. *Brown v. Chapman*, 3. Burr. 1418. So where an offence was punishable by an indictment at common law, and a statute prescribes a particular remedy, either the common law or the particular remedy may be pursued at the option of the party, *Rex v. Bayal*, 2. Burr. 832. See also *Rex v. Balme*, Cowp. 650. *Cater v. Knight*, 3. Term Rep. 442. *Rex v. Davis*, Sayer Rep. 133. *Rex v. Harris*, 4. Term Rep. 202.

ment will lie, *Rex v. Robinson*, 2. Burr. 803. *Brown v. Chapman*, 3. Burr. 1418. So where an offence was punishable by an indictment at common law, and a statute prescribes a particular remedy, either the common law or the particular remedy may be pursued at the option of the party, *Rex v. Bayal*, 2. Burr. 832. See also *Rex v. Balme*, Cowp. 650. *Cater v. Knight*, 3. Term Rep. 442. *Rex v. Davis*, Sayer Rep. 133. *Rex v. Harris*, 4. Term Rep. 202.

Cafe 200.

Clerk against Price, a Parson.

The spiritual court cannot entertain a libel for words reflecting on a parson in his profession which do not impute to him any misconduct of spiritual cognizance.
S. C. post. 140.

1. Inst. 493.
2. Roll. Ab 295.
Godb. 446.
Lutw. 1054.
Stra. 946.

A PROHIBITION was moved for to the spiritual court for words, which in the libel were laid to be, "that the said *Price* behaved himself proudly and insolently; and that he was "an impudent ignorant blockhead;" and that he also said and declared, "that the advice and exhortations, and other spiritual "directions of him the said *Price* from the pulpit, are not fit to be "taken;" and "that he was not fit to give the Sacrament." And that he the said *Clerk*, speaking to a third, said, "You would "not receive the Sacrament from such a puppy as the said *Price* "was, was you to live never so long in his parish."

PARKER, Serjeant (now *SIR THOMAS*), to shew cause why a prohibition should not go, said, these were not words of heat, but of deliberation, and highly touched him in *his function; and cited the case of *Crandon v. Walden* (a).

* [141]

But *HOLT, Chief Justice*, said (to which THE COURT did not disagree), that though these words did reflect on him in his profession, yet seeing they do not charge him with any thing for which he is obnoxious to the spiritual court, therefore a prohibition was granted (b).

(a) 3. Lev. 17.

(b) See *Coxeter v. Parsons*, where a prohibition was granted on a libel for saying, "He has no sense, is a dunce "and a blockhead. I wonder the bishop "would lay his hands on such a fellow : "he deserves to have his gown pulled "over his ears;" because a parson is

not punishable in the spiritual court for being a knave or a blockhead more than another man, 2. Salk. 692. S. C. 1. Ld. Ray. 423. S. C. 12. Mod. 231. S. P. *Nelson v. Hawkins*, 12. Mod. 104. S. P. *Newman v. Kingerly*, 2. Lev. 49. S. C. 3. Keb. 28. S. P. Anonymous, 1. Comy. Rep. 25.

And

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And IT WAS ORDERED to come before this Court, by declaration and demurrer (a).

CLERK
against
PRICE.

(a) See S. C. post. 208.

The Queen against The Mayor of Thetford.

Case 201.

IT WAS RESOLVED in this case, that in a motion for an information against A. an affidavit in a motion against B. cannot be read; because the swearer cannot be prosecuted for it if false (a). Affidavit in one motion cannot be read in another.

(a) For a full and complete knowledge of the practice of the court of king's bench respecting affidavits, see 1. Tidd's Pract. 29. 39. 63. 261. 272. 2. Tidd's Pract. 498. 764.

Davis against Daveril.

Case 202.

IN A MOTION FOR A NEW TRIAL, on a suggestion, that the defendant arrested and imprisoned one of the plaintiff's witnesses until the trial was over; IT WAS ADJUDGED to be good cause of granting a new trial (a). Imprisoning the opposite party's witness ground for a new trial.

(a) See 2. Salk. 645. 6. Mod. 22. 7. Mod. 156.

The Queen against Bonnet.

Case 203.

MR. EYRES moved to quash an order made by two justices of the peace, because the order was said to be made *coram custodibus pacis nec non iustitiariis, &c.* and all justices of the peace are keepers of the peace; but all keepers of the peace are not justices: And he further argued, that they have not been called *conseruatores pacis* only since the statute 34. Edw. 3. c. 1. "Conseruatores" "pacis" is a good name for justices of the peace.

But THE COURT over-ruled his exceptions, and adjudged the order good.

* [142]

* The Queen against Hungerford.

Case 204.

A MOTION was made for an information, in nature of a *quo warranto*, against a common-council-man of Bristol, for refusing to take upon himself the office, after he was chosen. Information for refusing to act as common-council-man, denied. Ante, 132.

But THE COURT denied the motion, and said their remedy was to proceed by their by-laws in order to compel him; he not being such a public officer as a sheriff, &c. but if they had applied to the Court for a *mandamus*, they should have had it.

The

Michaelmas Term, 6. Queen Anne, In B. R.

Case 205.

The Queen against Read.

Writing an obscene book not indictable.

S. C. Fort. 98.
S. C. 2. Stra.
789.

PER CURIAM. A crime that shakes religion (a), as profaneness on THE STAGE, &c. is indictable (b); but writing an obscene book, as that intitled, "The Fifteen Plagues of a Maiden-head," is not indictable, but punishable only in the spiritual court (c).

(a) See 1. Hawk. P. C. ch. 5.

(b) By 10. Geo. 2. c. 28. no drama or other entertainment of the stage can be acted, until a true copy thereof has, under a penalty of fifty pounds; been previously sent to the lord chamberlain, who may prohibit the performance; and such penalty may be recovered in a summary way, &c.

(c) This case is denied to be law, Rex v. Curl, 2. Stra 789. 1. Bar. K. B. 29. See also Rex v. Sedley, 1. Keb. 620. 1. Sid. 168. 10. St. Tr. Ass. 93. Rex v. Woolston, 2. Stra; 834. Rex v. Wilkes, 11. St. Tr. 324.

Case 206.

Etherington against Reynolds.

If a plaint be levied against a *feme sole* in an inferior court, and she remove it by *habeas corpus* and puts in bail as a *feme sole*, yet if the plaintiff declare against her as such, she may plead *coverture* in bar.

S. C. Salk. 8.

* [143]

AN INDEBITATUS ASSUMPSIT and *insimul computasset* was brought against the defendant Reynolds. She pleaded in *abatement* that she was a *feme-covert*. The plaintiff replied, that he entered a *plaint* against her when sole, in THE PALACE COURT, which she removed into the court of king's bench, by *habeas corpus cum causa*, and put in bail as a *feme sole*; and the plaintiff delivered her a declaration agreeable to the plaint below: to which replication the defendant demurred.

PENGELLY for the defendant, That she having removed herself up by *habeas corpus*, and having put in bail to answer a declaration here, nothing of the proceeding below is removed; as in case of a *certiorari* or *recordari*, in the case of *Surs v. Turner* (a), and the plaintiff ought to have declared against her, as she was at the time of the declaration delivered, and not as a *feme sole*, according to the plaint below.

HOLT, Chief Justice. If an *indebitatus assumpsit* be brought in an inferior court, and the defendant remove it up by *habeas corpus*, and to the declaration above plead *non assumpsit infra sex annos*; the plaintiff may reply, that a plaint was delivered in an inferior court within six years; but to this the plaintiff cannot reply, that the defendant was sole when the plaint was levied below.

THE COURT was inclined to give judgment for the defendant; but as an indulgence for the equity of the cause, it was adjourned to *Hilary Term* next (b).

(a) Hilary Term, 3. Queen Anne.

(b) S. C. 1. Salk. 8. says it was ruled to be a good plea; for in the superior court the proceedings are *de novo*, and the Court takes no notice of the proceedings below, or of what preceded the *habeas corpus*, but the course is in such

case to move the matter to the Court upon the *habeas corpus*, and the Court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit the Court may refuse it.

Michaelmas Term, 6. Queen Anne, In B. R.

Lawn against Sawbridge.

Case 207.

IN A WRIT OF ERROR out of the court of common pleas, in a *scire facias* against bail, the defendant pleaded "*in nullo est erratum*;" and the plaintiff assigned for error the want of a *scire facias* ON THE ROLL.

LUTWYCH for the plaintiff said, that the defendant's plea confessed the error assigned.

EYRES for the defendant argued, that it is not like the case where you proceed on an original, and the want of an original is assigned for error; for then the record may be removed without the original; but in this case, nothing can be removed but the *scire facias* itself; and so it is repugnant to say there is no *scire facias*.

Resolved by HOLT, Chief Justice, that this error might be assigned, as well as the want of an original bill; and that by pleading "*in nullo est erratum*," the plaintiff has confessed the error:

But the whole Court, viz. HOLT, Chief Justice, POWELL, POWYS, and GOULD, Justices, agreed, that a *certiorari ad informandum conscientiam Curie* might be awarded.

Which was done accordingly.

If to a writ of error on a *scire facias* against bail, the defendant plead *in nullo est erratum*, and assign the want of a *scire facias* for error, the plea is a confession of the error; but the Court may award a *certiorari* for the information of the Court.

Yelv. 57.

Cro. Jac. 521.

1. Lev. 311.

2. Lev. 38.

HILARY

Love and Faith

75-118

197

HILARY TERM,

The Sixth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* [144]

* *Alton against Jarvis.*

Case 208.

TRESPASS for entering his close, and taking cattle. The defendant justified by several judgments in A COURT-BARON, where the plaintiff had levied a plaint against the defendant; whereupon judgment was given for the defendant, and costs given him; and thereupon the defendant, by virtue of a *levari facias*, took the cattle and sold them; and for this the plaintiff brings his action.

Qu. Whether goods taken under a writ of levari facias, if sued by a COURT BARON upon a judgment for costs, may be sold without a writ de executione judicii.

The defendant demurred to the declaration.

RAYMOND for the plaintiff insisted, that they could not sell the cattle upon a *levari* in A COURT-BARON, without alledging a custom for so doing (a); and cited *Bro. Abr. "Execution,"* 80. *Lutw. 1524. Dalt. Sher. 419. Lutw. 1410. Kel. 106.* The bailiff ought to keep the distress until the parties agree (b).

LUTWYCH contra. If the bailiff cannot sell, it is to no purpose to take execution; but the words of the writ are, "*quod levare facias*, so that he have the money at the next court (c)," which

(a) See *Gomerfall v. Wayts, Cro. Jac. 255.*

(c) See *Plowd. 441. a. Fitz. N. B. 593. Skin. 619.*

(b) 3. *Com. Dig. "Copyhold" (R. 18).* and *Gilbert's Distresses, 21.*

Hilary Term, 6. Queen Anne, In B. R.

ALTON
against
JARVIS.

cannot be, unless he may sell; and he cited *Bro. Abr. "Execution,"* 26. 2. *Lev.* 81. 3. *Keb.* 126. 8. *Co.* 41.

RAYMOND replied, that *Bro. "Execution,"* 26. is no judgment, but only an inference; and is precedent in time to *Bro. "Execution,"* 80. 2.

HOLT, *Chief Justice.* "Distraining" is "levying." (2.) If a man distrain for rent, and impound the distress, and then bring * debt for the same rent, the defendant may plead "levied by distress." As to the selling by the *levari*; it is always alledged in pleading to be *secundum consuetudinem manerii*, which is the custom in most manors, being so general, that any court-baron, &c. may plead it as a custom (a).

Adjournatur (b).

(a) See 7. Mod. 1. 44. and Gilbert's 1413. *Pell v. Towers*, Noy, 20. *Brit. Law of Distresses*, 21. *ton v. Cole*, 1. *Ld. Ray.* 305. S. C.

(b) See *Walker v. Freeby*, 2. *Lutw.* 5 Mod. 109. S. C. 12. Mod. 175.

Case 209.

The Archbishop of Canterbury against Willet.

An administrator under the usual bond "to exhibit an inventory, to administer truly, and to render an account," is bound to perform within the time limited, although not cited by the Court so to do.

S. C. Salk. 172.
251.
Stra. 1137.
Cowp. 285.
1. H. Bl. Rep. 109.

DEBT upon an administration-bond of three thousand pounds; and on oyer of the condition it was "to cause a true inventory to be made, and to exhibit it into court, and well and truly to administer, and to render an account, and to deliver the rest as the Court should adjudge."

The defendant pleaded, that he had exhibited an inventory, duly administered, and never was cited to account, nor was there any adjudication that he should dispose of the rest.

THE QUESTION was, Whether an administrator is bound to render an account, though he never was cited?

The judgment was, that he is bound to put in an account before the last day in the condition, at his peril.

HOLT, *Chief Justice.* An executor is bound to account (a). If an executor be summoned by a creditor, and make his account, the ordinary cannot hold plea of it, because the ordinary cannot relieve (b); but he must take the account, as the executor has made it upon oath (c). But if a legatee come he may unravel the account, because it is the only court for him to sue him in; and therefore he is not bound by that account (d). But if the executor will pay him his legacy, then he cannot compel him to exhibit an inventory or to account; because he has the end of his suit (e).

(a) See Year Book 21. *Edw.* 3. and Henley's Case, 9. Co.

(b) 2. Inst. 600. Noy, 78.

(c) 1. Salk. 315. So also, although the spiritual court may compel churchwardens to deliver in their accounts, yet

that court cannot decide on the propriety of the charges, *Leman v. Goulty*, 3. Term Rep. 3.

(d) 1. Salk. 316.

(e) Raym. 407. 470. See *Rose v. Mercy*, 1. H. Bl. Rep. 109.

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The statute 22. Car. 2. c. 10. of Distributions, makes the *next of kin* legatees. Before the making of this statute, the administrator should account when he was thereto required (a); and he is now bound to do this at his peril, * unless he can shew some cause to the contrary: and here he ought to have shewn some reason why he did not. Whenever a man is bound in a bond to do an act that is possible (especially if it is to be done at a certain time, or place), he is bound to do it at his peril (b). So it is in a mortgage; and when a man is bound in a bond to do an act that cannot be done, as to give an account at a court such a day, &c. he ought to plead, that there was no court held that day, &c. and that he was ready at the place, and had done all that he could. See the *Year-Books* 13. Edw. 3. pl. 13. 14. Edw. 3. pl. 17. 18. Edw. 3. pl. 70. and the case of *Blackwell v. Aidell*, Lutw. 182. which HOLT, Chief Justice, took to be a very good case, 8. Co. 120. 130. which cases were cited to shew, that if the plaintiff makes a bad replication, he may destroy his cause of action; and that for the case seemed to be here: and therefore ordered it to be spoken to again next Term, *quoad* this matter.

But THE COURT were clear, that the bar was naught; and that he was bound to account, without citation, at his peril.

And by POWELL, Justice, He has here confessed a breach, because he says, he was never cited, and so it may be good, *quoad* the defendant's confession, though the plaintiff has not shewn any breach.

Adjournatur (c).

(a) Co. Ent. 128.

(b) Baker v. Spain, Hob. 8. Coventry v. Woodhall, Hob. 134.

(c) HOLT, Chief Justice, afterwards delivered the opinion of the Court, that since the statute 22. & 23. Car. 2. c. 10. the condition of an administration bond is, that the administrator shall account at a day certain; that he must account accordingly at his peril, and that without citation or suit; that this account must be

in court; but that if he come on a day when no court is held, he shall be excused; for he may plead that he was there ready and no court, &c. And also, that this account is not examinable unless a party interested comes in and controverts it, S. C. 1. Salk. 316.—A creditor has a right *ex debito justitiæ*, as well as the next of kin, to sue an administration bond in the name of the ordinary, Archbishop of Canterbury v. House, Cowp. 140.

After against Wallis.

Case 210.

A MAN having a wife in England goes to Jamaica, and there if a married man marries a rich woman, and lets her lands, reserving rent to marry another himself, and receives the same divers years; but after some time, woman, and receive the rents they both coming into England, she perceived that he had another of her estate, she may maintain an wife living; and thereupon brings an *indebitatus assumpsit* against him for the said rents, as so much money received by him to her use. *indebitatus assumpsit* against

At the trial at GUILDHALL, London, this point was saved to be argued by Counsel, Whether an *indebitatus assumpsit* would lie in them as for monies received to this case? which was argued this Term.

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DEE, the Common Serjeant, said, It was like the case of a *disseisor*, who could not maintain an *indebitatus assumpsit* * against the *disseisor*, as for money received to his use; and in this case there was another and a proper action; for if the rents were received with her consent, she might have an action of account against him as *receiver*; if without her assent, trespass lies.

EYRE also for the defendant said, that an *indebitatus assumpsit* will not lie, but where money is due on some *contract*; therefore where one man enters on another, and sells his goods, &c. he who has the property in them cannot have an *indebitatus assumpsit* for the money received, as for money received to his use; but must have his action as for a wrong done, *viz.* trespass, assize, &c.

Q. Cro. Eliz. 82,
35.

WHITACRE for the plaintiff said, that the action lies; for the plaintiff was consenting, and often present when the money was paid; that where *debt* will lie, an *indebitatus assumpsit* will also lie (a) in many cases, so not confined to a particular action. But here it cannot be said, that the defendant was a wrong-doer, because it was done with her consent: besides, an *indebitatus assumpsit* will lie, though there was no contract; as for the profits of an office wrongfully received, though received by one who pretended a title (b).

DARNEL also for the plaintiff, that there is no need of a contract to maintain an *indebitatus assumpsit* (c); for where money is over-paid, this action will lie for the surplus (d). If the wife lend her husband's money to J. S. the husband may have either *indebitatus assumpsit* (or trover. Q.). If rents are received by *false tokens*, either *account* or *indebitatus assumpsit* lies (e).

And BY THE WHOLE COURT it was agreed, that an *indebitatus assumpsit* would well lie.

But HOLT, Chief Justice, said, that *trover* would not lie in this case, because she was never possessed of the money (f); and when she married the defendant, she consented that he should manage her estate. He cited a case, where if money be over-paid, either *debt* or *indebitatus assumpsit* lies (g). If two lay a wager, and stake down the money, the winner shall have an *indebitatus assumpsit* against him that holds the stakes, as for money received to his use (h).

And judgment was given for the plaintiff.

(a) See Slade's Case, 4. Co. 92.

(b) See the Case of the City of London, 9. Co. . See also Sir William Sutherland v. Bignal, 2. Stra. 747. Duppa v. Gerrard, Salk. 78. Stockhold v. Collington, Salk. 330.

(c) 3. Mod. 260.

(d) See Moses v. Macfarlane, 2 Burr. 1012. Grove v. Dubois, 1. Term Rep. 112. Bize v. Dixon, 1. Term Rep. 281.

Robinson v. Easott, 1. Term Rep. 59. Clark v. Shee, Cowp. 197.

(e) See Whip v. Thomas, Bull. N. P. 130. Clark v. Shee, Cowp. 197.

(f) Blackham's Case, Salk. 490.

(g) 1. Co.

(h) See Bovey v. Castlemain, 1. Ld. Raym. 69. Hard's Case, Salk. 23. Jones v. Randal, Cowp. 37.

HILARY TERM,

The Sixth of Queen Anne,

I N

The Common Pleas.

Thomas Lord Trevor, Chief Justice.

Sir John Blencowe, Knt.

Thomas Bury, Esq.

Robert Tracey, Esq.

} Justices.

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

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* Arthur against Bokenham.

Case 211.

EJECTMENT was brought for a house in Kent by John Arthur, on the demise of Robert Bokenham, against Frances Bokenham, widow.

A devise of "all such lands, tenements, and estate whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then, or of right doth appertain to me," will not pass an estate purchased subsequent to the making of the will.

On not guilty pleaded, there is a SPECIAL VERDICT, wherein the jury find, that as to a moiety of the said house the defendant is not guilty; and as to the other moiety they find, that William Bokenham, esq. late the husband of the defendant, being commander of their late majesties ship THE GRAFTON, on the third of May, in the year one thousand six hundred and ninety-two, duly made his last will and testament in writing, which they find *in hæc verba*. It recites, that he was then bound out to sea, and then says, "I do hereby give, devise, and bequeath unto my well-beloved wife, Frances Bokenham, all such sum and sums of money as now is, or hereafter shall grow due to me from their majesties for my own and servants service, either by sea or land. As ALSO all such sum and sums of money, lands, tenements, goods, chattels, and estate whatsoever, wherewith at the time of my decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me. AND I do hereby nominate and appoint her, the said Frances Bokenham, my well-

S. C Fitzg. 234.
S. C Holt, 750.
S. P. ante, 121.

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" beloved wife, to be the whole and sole executrix of this my last will and testament." THEY FURTHER FIND, that the testator, at the time of the making of the will, was not seised of any lands whatsoever; but that afterwards by deeds of lease and release, bearing date the twenty-sixth and twenty-seventh days of February 1693, Sir John Franklin and Thomas Halsey, being seised in fee of the other moiety of the said house, conveyed the same to the said William Bokenham and his heirs, whereby he became seised, and so died without issue of his body. THEY FIND, that the house aforesaid is held in socage, and is of the nature of *gavelkind*, and devisable by the custom of Kent, and to be divided amongst the heirs male, by hereditary right. * THEY FURTHER FIND, that the testator had two brothers, Robert lessor of the plaintiff, and Harry Bokenham, who was then dead, and had left issue of his body Anne, an infant; and that Robert and Anne were heirs at law to the testator. THAT Robert Bokenham entered into the said moiety, and demised to the plaintiff, upon whom the defendant the devisee entered; but whether the defendant be culpable, they desired the opinion of the Court.

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TREVOR, Chief Justice, delivered the opinion of the whole Court.—THE QUESTION is, Whether these lands, that is the moiety named in the special verdict, do well pass by the will to the defendant Frances Bokenham, or not? for if they do not pass, then this moiety belongs to the lessor of the plaintiff. And we ARE UNANIMOUSLY OF OPINION, that those lands do not pass to the defendant by this will. This question, touching the validity of this will, depends on the consideration of two matters. FIRST, On the consideration of the statute of Wills, 32. Hen. 8. c. 1. which was made to enable persons to devise lands by their last wills.—SECONDLY, On the consideration of the custom of *Gavelkind*, which is particularly found in this special verdict. In the first I will consider, whether the statute enables any one to devise lands he is not owner of, nor has any interest in, at the time when the will was made, but purchases lands in his life-time after the making such will. This depends on the construction of the statute 34. Hen. 8. c. 5. which says, "that all and every person and persons having manors, messuages, lands or tenements, shall have full and free liberty to dispose and devise the same by his last will and testament." Whether the word "having" makes it necessary that the testator should have the possession of, and interest in the lands, at the time of making his will (a)? or, Whether it be sufficient if he have or purchase the * lands at any time after the making his will, and before his death? Now in order to come at the meaning of this statute, I will suppose this act lately made, and that there had been no construction made thereof before, but that the question was entirely new and undetermined, and that it was now *res integra*; What would then be a reasonable construction of those words of the act? And in the next place, I will con-

(a) See Butler v. Baker, 3. Co. 30. and Loveis's Case, 10. Co. 78.

sider what construction this act ought to receive, as it has been already expounded and determined, and from the consequence of such determination. Now as to what would be a reasonable construction, supposing it were to be made *de novo*, and to be now originally expounded, I AM OF OPINION, it would be a very reasonable construction, that this act should not extend to enable any person to devise any lands he has not, nor is owner of at the time of making his will, unless he republish it; which is the same in substance as new making it. The general rule in exposition of all acts of parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare; therefore in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had had that design, they would have expressed it in the act. Now how will the common law influence this matter before us? FIRST, It is plain by the rules of the common law, that is, such rules as are to govern conveyances and dispositions of estates, that the law did never allow any person, by any conveyance at common law, to dispose of the lands he had not, or had no right or interest in at the time of making and executing such conveyance. * And so is 1. *Inst.* 265. It is there said, and was never yet denied, "if one release all the right he has, and all the right which he should or could have for the future, though in express words which sufficiently shew the intent of the party, yet such release is void, &c." And this was never contradicted by any one. However, there are some exceptions to this rule as to releases of future rights; that is, that in some cases a man may release a future right, though by the bare release it can never pass; as 1. *Inst.* which I mentioned before. If there be father and son, and the son disseise the father, and being in possession make a feoffment in fee, in the life-time of his father, though no right or estate is yet descended upon him from his father, yet this feoffment will bar him of this future possible right, when it does descend and come to him. But this is grounded on a particular reason; that is, because he had more than a mere right, for he had the possession of the land, and therefore might make a legal conveyance thereof; and the law favours extinguishment of rights, so that the right and possession may go together: besides, a feoffment is of an high consideration in the law, because it is executed by livery, and causes a transmutation of the possession, and therefore is carried even to the extinguishment of former rights, in favour of him who has the conveyance; for by this feoffment he did not convey a bare right only, but the estate also; so that the feoffee might by law make a feoffment thereof, and by implication, upon such feoffment and livery, all future rights of him that made it are extinguished; for being in possession, and conveying the land itself, he conveys all rights attending thereon, whether present or future; but yet this does not bar his

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heir at law, for he may enter notwithstanding; and as to him the right is not absolutely extinguished; though at the same time this feoffment is good against him that made it. This general rule again admits of another exception; and that is in the case of a release with warranty: where a man makes a feoffment with warranty, that warranty will bar a future right, and that will go to the heir * and bar him too; but then that is grounded on a particular reason, wherefore the warranty bars, because to avoid circuitry of action; for if the heir of him who made the warranty should recover the land against his father's grantee, this land, when it descended to him, would be assets in his hands, and would be liable to the warranty; so that it works an extinguishment of this future right, by way of rebutter. But there is no case in all the law, that by any legal conveyance at common law, a man could convey lands that he had no right to, nor was in possession of at the time of such conveyance. In the first case he had not the possession, nor any present right; but if he had, by the release it would have been extinguished to him who had the possession; because that the possession, which the law favours, should not be disturbed; but future rights it was never extended to. Yet the law has allowed releases of rights, which are in the nature only of possibilities, that a man may release to him who has the possession a possible right only, though it does not allow him to transfer or convey away to a stranger such a right; and that is the reason why the law allows a man to release an executory interest in a term which he has devised to him, and is in the nature only of a possibility; but yet he cannot assign it away to a third person, though he may, as I said before, release this right to the possessor of the land by way of extinguishment. So that the rule of construction of conveyances at common law, will be the true rule to expound this statute. But to narrow this question a little more; I do agree, that devises of land have not been subject to the strict rules of conveyances at common law, because the law favours dispositions by will to make them agreeable to the intent of the testator; whereas conveyances at common law stand on a different foot. In the case of wills the testator is *inops consilii*, and has no opportunity of observing the formalities of law, and therefore wills are not in all cases subject to the rules of conveyances at common law; but then all this * is grounded on this supposition, that the testator has wherewithal to make disposition

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uses.

of. Let us then consider, how the law makes a construction in what comes nearest to wills; and that is conveyances of land to uses, which the statute of 27. Hen. 8. c. 10. has executed into possession. The rules of construction in these cases are the most proper rules to be adapted to wills. Wills have been all along construed according to the intent, and so has the law all along supported those conveyances to uses, on the supposed intention of the party, though there should be some defects in them. The law has done the same as to wills; they are likewise supported according to the intention of the party, to supply such little defects as may be in them. Now by conveyances to uses at common law, could
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any man convey a use in land which he had not at the time of making the conveyance? No, surely he could not; and that is plainly proved by the case of *Yelverton v. Yelverton* (a), cited at the bar, where the father covenanted to stand seised of lands which he afterwards should purchase, to the use of himself for life, and after to his youngest son and his heirs; and afterwards he purchased lands and died; and the question was, Whether the eldest or the youngest son should take? and it was there resolved, that no use could arise to the youngest son, being of land which he had not at the time of the conveyance: and that is grounded on very great reason, because he cannot raise a use of land which is not his own; for if a man who has no right to the land can raise a use of that land, then two at the same time might raise uses; for it cannot be denied, but he who is owner of the land, may dispose of it, or raise what use he please, and that he is the proper person, on a sale, to declare the use. It is impossible that the same land should be to "the purchaser for life," with remainder to "the youngest son and his heirs," and at the same time should be to "him and his heirs." These would be to make contradictory * uses in being at one and the same time, as being declared by different persons. It is allowable indeed in the law, for a man to covenant that he will purchase lands by such a time and levy a fine thereof, and that the same shall be and enure to such and such uses, but then the reason of that is, that when the land is purchased and fine levied, the use arises on the fine, and not on the deed made by him before he was owner of the land; and though he could not declare the use before he had the land, yet the fine by relation raises the use, and the deed made before is only an evidence of his intention that it should be to such uses, if no uses were declared at the time of levying the fine; for at that time he might declare other uses; but no other uses being declared, that deed serves for an evidence of the intention of the party, no other intention appearing. To apply that to this case; here is a conveyance by will made, whereby land is disposed of which he had not at the time of making the will, and is a disposition to take effect *in futuro*; and so was that case, a grant and disposition of land when he should purchase it; so this will cannot be a present disposition of what he had not, but a declaration how the land should go at his death. But it is very plain that the making of the will is the foundation, and is an inchoate disposition, so that if the deviser has not the land at that time, it will not pass. There is yet a further reason why wills should receive such a construction as conveyances by way of use, and why they should imitate such conveyances; because it appears that that act of parliament of Wills was made to supply the powers of declaring uses by men's last wills and testaments, which they had before the statute 27. *Hen. 8. c. 10.* of Uses. For though the subjects before the act 32. *Hen. 8. c. 1.* had not any power to dispose of their lands by their last will, yet they had what

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Statutes of Uses
and of Wills.

(a) 2. Roll. Abr. 79. 790. Noy, 19. Moor, 342. 375. Cro. Eliz. 401.

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Objection.

Answer.

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was tantamount, which was a power to declare uses by their last will ; for before the 27. Hen. 8. c. 10. of Uses, which executes the possession to the use, all the lands were subject to *cestui que use*, and he had a power to declare the uses of the land ; the trustees * had the possession as he thought fit, either by deed or will ; so that in effect he had a power of devising by will, by declaring the uses that the trustees should stand to, after his death. But when the statute of 27. Hen. 8. c. 10. came and executed the possession to the use, then the *cestui que use* had no longer any such power of declaring the use as before, because then the use and the lands were the same thing, being united together ; and that is the reason why this statute of Wills gave men a power to dispose of their lands by will, which was given in lieu of that power which *cestui que use* had before of declaring the uses of the land, as he thought fit ; and therefore there is a great deal of reason a will should receive the same construction. But it is objected, that a will is not to be construed according to conveyances by deed at common law, because a will is no present and immediate disposition of land, and is not like a deed, that takes effect immediately by delivery ; for in such cases a man must have the land at that time, else it is against the nature of a grant or immediate gift, to dispose of what he has not, but that a will is another thing. It is only a future disposition in case the man dies without any other alteration ; and is ambulatory, and not completed or consummated till his death ; and therefore reason good he should be able to dispose of the lands he should have or purchase at any time before his death, because it does not take effect till his death. Now in answer to this objection, I shall distinguish to what purposes a will does not take effect till death, and to what purposes it does take effect from the time of making and before the party's death. It is true, to many purposes a will takes no effect till the testator's death ; but on the other hand, to many other purposes it takes effect from the time of making only. The law does require many qualifications necessary to be in the testator at the time of making the will, which should they come at any time after, though before his death, would make the will void, and the lands would not pass thereby. Indeed * as to the vesting an interest in the devisee, the law has regard to the death of the party only, for no interest can vest in the devisee as long as the testator lives ; and a will, in its own nature, is not to pass any thing but on supposition of the testator's death ; for it is a provision and direction how his lands and estate should go when he can keep them no longer. Where a man devises lands to another, and the devisee happens to die before the deviser, this is a void devise, and the lands do not pass ; for if they should, the heir of the devisee must take contrary to the intent of the deviser ; for by the will he was intended to take by descent ; and if lands pass, he must now take by purchase. In this regard also a man's wife may take by his will, though she cannot take by any conveyance at common law ; for the will not taking effect, in point of transference of an interest, after the husband's death she is in nature of a stranger,

stranger, and so the land will well pass to her; and in many other cases of this nature, which I could mention if necessary, a will takes no effect till the death of the testator. But when you consider another thing necessary to make a will good, as a necessary qualification in the testator, which is the power and capacity of disposing by his will; there I take it the law regards the time of making the will; and as to the power of disposing lands by will, that consists of several particulars. As, FIRST, To enable the testator to dispose by will, or any other way, the law requires he should have an interest in the thing he is to dispose of; and if he has nothing in the thing to be disposed of, how can he be said in any sense to have a power of disposing it? SECONDLY, The testator must not only have an interest in the thing devised, at the time of making the will, but must have a disposing mind too; he must have ability and capacity, in point of discretion and understanding, as a rational man, and these two qualifications are necessary to make up the power of disposing; and this power must be perfect and complete at the time of making the will; and none of those qualifications coming after, though before * the death of the testator, will make this power good, and the will effectual in the law; these are personal qualifications, and must be had at the time of disposing, and will be too late to come after. Now as to the qualification in point of discretion; if a man be *non compos*, and not in his right senses at the time of making his will, though he afterwards, never so long before his death, becomes a man of understanding, and sound judgment and memory, yet the will is a void will, and will by no means be made good; because he wanted the disposing power at the time of disposition, which was the time of making his will. So the law is the same of a *feme-covert*; if a married woman makes a will, though she becomes a widow and unmarried before her death; yet such is a void devise without republication, for the law here regards the time of making only. So it is in the case of an infant; if he make a will, though he be of age, nay though never so old when he dies, yet it is a void devise; because he had not discretion, nor a disposing mind at the time of making; for it is that which the law regards in these cases, and not the time of the death of the testator. Then as to the other part or necessary qualification which goes to the power of disposing, which is ownership of the land; the law requires that to be complete at the time of making the will. Consider as to this point, the law is very strict that the testator should have a disposing power at the time of making the will; for it is so far from allowing a subsequent power by acquisition after to make the will good; that the law requires a continuance of the same interest that the deviser had at the time of making the will, to remain unaltered even to the time of his death; for that any even the least alteration of this interest is an actual revocation of such will: as where there is a tenant in tail, and he makes a will and devises these lands away; now though he has an inheritance in these lands, and they are his own, and he could dispose of the absolute inheritance

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inheritance and fee-simple by fine and recovery, yet if after the making such * will, at any time before his death, he suffer a recovery to him and his heirs, and alters the estate from a tail to a fee, this is so far from making his will good, that it is an actual revocation of the will; yet he was owner of the land when he made the will, and is no more now, but only the estate is altered, and he has now another sort of fee. Nay the law is still stricter; as where there is tenant in fee-simple, and he devises his lands away to another, and after that, and some time before his death, makes a feoffment of these lands to another, to the use of himself and his heirs; though this to some purposes is no alteration, for he is absolute owner of the estate as before, yet this does not make the will good, but is a revocation thereof; and so it was adjudged in the *Case of Lord Lincoln*, though so small an alteration was in the estate. Now this shews the law requires the testator should have a complete power of disposing at the time of making the will; and that that power and interest he had at that time should continue, and be the very same at the time of his death. Now if the law will not allow any the least alteration of estate from that which he had at the time of making the will, but will rather work a revocation and destruction of that will; I do not see how the testator's purchasing after can work here to make the will good, when he had nothing at all, no interest in or to the land at the time of making the will: this is a far greater alteration than from a tail to a fee, or from one sort of fee to another. For this is an acquisition of a new right and a new power; it is totally a new interest purchased after making the will, when he had neither right nor interest at the time of the will, which can never have effect to make this will good. So that as to the power of disposing lands by will, the law requires the deviser to have this power complete and entire, both in regard of the estate and interest to be disposed of, and in regard of the testator's understanding and discretion, which are necessary to be had at the time of * making the will; and these things though they happen afterwards, though never so long before his death, yet they come too late to make the will good. So that if this act of Wills were now *de novo* to be construed, it would receive this construction, that a man's having lands, so as to give him a power to devise them by will, by virtue of the said act, must be meant, having those lands at the time of making his will, and not at the time of his death only. But then in the second place, this being a law made a long time ago, and it has received many uniform determinations agreeable to this construction; this ought to be of great consideration always, that the law may be certain, when there have been solemn determinations after long debate, and an acquiescence under them; and when accepted and received as a rule of property, though some should not be satisfied in their private judgments, were the matter to be newly resolved, it is but reasonable we should acquiesce and determine the same way, to prevent greater mischiefs which might arise from the uncertainty of the law. Now there have been several solemn resolutions,

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solutions and acquiescence under them, that a man cannot dispose of lands before he has them. As to the case of *Brett v. Rigden*, I do not think that to be a determination of this point. That case was no more than this: A man had lands in a certain parish or place, and made his will, and gave away all his lands in that parish, and afterwards, some time before his death, purchases other lands in the same parish; and the question was, Whether these new purchased lands should pass, or not? and held they would not. But that judgment was not grounded on this question, Whether the testator could devise lands he had not? but, Whether the words of the will, in point of intention, could extend further than to those lands he had at the time of making the will, there being in that will no future words nor declared intention of passing any lands he should purchase *in futuro*? That judgment went rather on a supposition that the intention of the testator was satisfied, in passing those lands the testator had at the time of making the will; * for there being no future words in the will, it might be the intention of the testator that the devisee should have the lands he had at the time of making his will, and his heir have the new purchased lands by descent. But there are some cases in point with this: as the case of *Butler v. Baker (a)*, and *Leonard Loveis's Case (b)*. They go expressly on the word "having" at the time of making the will; and this has been all along taken as the rule; and all people ought to acquiesce therein, being so often and so solemnly in this manner determined (c).

And now I come to THE SECOND MATTER on which this case depends, and that is *the custom (d)*.

Whether, though it should be allowed, that by a will a man cannot dispose of lands which he had not at the time of making the will, and which he purchased afterwards, yet whether such devise may not be by such custom as is here found? and, Whether such custom will not make this devise good? And I am of opinion it will not. The custom found is no more than that gavelkind land may be devised by will in writing: but there is no such custom found, as that a man may devise gavelkind land that he had not, but only that gavelkind is devisable. If it be a reasonable construction of the act of Wills, that to enable a man to devise, he should have the land at the time of making his will, why should not this custom be so expounded, since the custom is only to enable

By the custom of Kent, gavelkind lands are devisable by will, but this custom will not pass gavelkind lands purchased after the making of the will, although the words are, "all such lands wherewith at the time of my decease I shall be possessed of."

(a) 3. Co. 25.

(b) 10. Co. 78.

(c) See *Lawrance v. Dodwell*, 1. Ld. Ray. 438. Holt, 243. 1. Lut. 287. *Strode v. Falkland*, 3. Chan. Rep. 99. But if a man has an equitable estate, a devise of it will be good, *Prideaux v. Gibbon*, 2. Ch. Cases, 144. *Davie v. Beardsham*, 1. Chan. Cases, 39. *Atcherley v. Vernon*, 9. Mod. 78. *Greenhill v. Greenhill*, Prec. Ch. 320.

2. Peer. Wms. 631. *Potter v. Potter*, 1. Vezey, 437. *Langford v. Pitt*, 2. Peer. Wms. 629. *Perry v. Phillips*, 1. Vezey jun. 255. *Brydges v. Duke of Chandos*, 2. Vezey jun. 427.

(d) See this custom also found in the following cases, *Launder v. Brookes*, Cro. Car. 561. *Brown v. Brookes*, 2. Sid. 154. *Hammond v. Thornhill*, Stiles, 476. *Wiseman v. Cotton*, Hard. 325. *Brunker v. Cook*, ante, 121.

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Rule.

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a man to devise land? If it be a reasonable construction as to common socage lands, why not as to gavelkind lands, since there is no more particular in one case than the other? and the rather, because all customs which are against the common law of *England*, ought to be taken strictly, nay very strictly, even stricter than any act of parliament that alters the common law. It is a general rule, that customs are not to be enlarged beyond the usage; because it is the usage and practice that makes the law in such cases; and not the reason* of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage; and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom. Now in construction of acts of parliament it is otherwise, and there is a greater latitude allowed in them; and the reason that induced the law-makers to make such acts to take away the common law, may be and is usually urged in making construction of them. Therefore in doubtful cases we may enlarge the construction of acts of parliament according to the reason and sense of the law-makers, expressed in other parts of the act, or guessed, by considering the frame and design of the whole. But it is not so in the case of a custom, because not founded on any particular reason; for the reason of the common law is against it; but the law allows usage in particular places to supersede the common law, and is the local law, which is never to be extended further than the usage and practice, which is the only thing that makes it law. Now there is nothing here found of a usage to devise lands which a man had not, or which he should afterwards purchase; and then we must enlarge this custom to devise lands which the devisor had not at the time of making the will, which is beyond a reasonable construction; for though it be lawful and customary to devise lands a man has, yet it does not follow, that by the same reason a man may devise the lands he has not, for it is on different considerations; because the common law enables a man to dispose of what he has; but there is not the same parity of reason, that custom should enable a man to dispose of what he had not; nor did it ever give a man leave to dispose of what he had not, it being a thing against reason, that any man should have a right to* dispose, when he had not the thing to be disposed of; therefore it ought not to be carried in parity of reason further in a custom, which ought to be construed more strictly than it would be at common law. But then it is further objected, that this custom is a general power of disposing, as far as a man may, his goods and chattels at common law, which he may devise in manner as is contended the lands ought to go in this case. For it is said, say they, in *Fitzherb. Nat. Brev.* that this custom of gavelkind land is to devise lands *tanquam bona et catalla*. But surely these words do not prove that gavelkind land by such custom may be disposed of to all purposes as goods and chattels:

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chattels: There is most certainly a great deal of difference between a devise of lands and a devise of goods and chattels; goods and chattels were always taken to be testamentary things. If a man make a will, the law gives all his goods and chattels and personal estate to his executor; by his being named executor, he has a right to all the personal estate; and if a man made no will, the ordinary did dispose of the intestate's estate, until the statutes for granting administration were made; so that as to the personal estate the law did appoint no person who should take in succession as to that, unless the testator did dispose thereof; but as to lands, the law has appointed the heir to represent the ancestor, and to succeed him in his inheritance; therefore lands ought not to go from the heir to whom the law has given them, otherwise than as expressly devised from him to some other. And though the testator does dispose of his *goods and chattels* by his will to legatees, yet they all pass to the executor, and he has them in the nature of a trustee; and he alone has a title in law to them, and nothing passes to the legatee; nor can any legatee take any thing devised to him until the executor do assent; so that this in effect amounts to no more than a direction to the executor how he shall dispose of his testamentary estate, when debts and funeral expences are paid.

* Testaments of goods and chattels are by the civil law, and of ecclesiastical consueance, and subject to the rules of the spiritual court, and to be governed by their law; but as to lands nothing enables a man to take but the common law, and the heir is in by descent, as being the person appointed by the common law to succeed and represent his ancestor; and if lands are devised away by a will from the heir, they pass immediately by the will to the devisee. So that there is a mighty difference between a disposition of lands and of goods and chattels. The cases cited at the bar to maintain this devise, were *Brook (a)*, *Fitzherbert (b)*, and *Statham's Abridgment (c)*, the same title; and these were pressed as authorities in point. All these cases are founded on THE YEAR BOOK of *Henry the Sixth (d)*. I have looked into that book, but that does not by any means warrant any such opinion, for the principal case was no more than this: A man devised land, and was after that disseised, and then died; the question there was, Whether it was a good will, because he did not die seised? and their opinion seems to be, it was not a good will, because he did not die seised. And then the Book says, But suppose a man should after making his will purchase land? and there is no resolution as to that, but only a *Quære*. So that these Books are only collection and inferences upon the 39. *Hen. 6.* which warrants no such thing, but rather the contrary; especially if it be considered this case must be on a custom to devise, because long before the statute of Wills.—And therefore for these reasons I think the plaintiff ought to have his judgment.

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(a) Bro. Abr. "Devise" pl. 15.

(b) Fitz. Abr. 17.

(c) Stath. Abr. 11.

(d) 39. *Hen. 6.* pl.

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and the establishment of colonies. The American Revolution led to the birth of a new nation, and the subsequent years saw the expansion of territory and the growth of industry. The Civil War was a pivotal moment in the nation's history, leading to the abolition of slavery and the strengthening of the federal government. The Reconstruction era followed, and the nation began to heal the wounds of war. The late 19th and early 20th centuries saw rapid industrialization and the rise of big business. The Progressive Era brought about reforms in government and society. The 1920s and 1930s were characterized by economic challenges and the New Deal. The mid-20th century saw the rise of the Cold War and the civil rights movement. The late 20th and early 21st centuries have been marked by technological advancement and global challenges. The history of the United States is a testament to the resilience and ingenuity of its people.

HILARY TERM,

The Sixth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

* The Mayor of London against Markwick.

* [164]
Case 212.

ERROR out of the common pleas.—The case was this: If the mayor of London brought action on the case on a by-law (a), in the sheriff's court in London, and had judgment, The defendant brought a writ of error in THE HUSINGS, according to the custom of London, and was bound in a law, a bond for eight hundred pounds to THE MAYOR, to prosecute it with effect: upon which bond THE MAYOR brought an action of debt in the court of common pleas, and at last it came by writ of error into the court of king's bench, where

the defendant, with effect, is a good bond; for although in the court of husings the lord mayor is judge, yet it may be held before six aldermen, without the mayor, and it shall be presumed that he was absent when the errors in his own cause were determined.—S. C. i. Bro. P. C. 216.

(a) The by-law was, "That if any citizen of London, being fully qualified, should be duly elected and chosen to be one of the sheriffs of the city of London and county of Middlesex, and should refuse to take upon him the said office (unless he should be discharged by oath as to the insufficiency

" of his estate, not being worth 10,000l. at the time of his election) he should forfeit the sum of 400l. to the mayor and commonalty and citizens, to be recovered by action of debt in any of the courts of record within the city of London."

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THE

Hilary Term, 6. Queen Anne, In B. R.

THE
MAYOR OF
LONDON
against
MARKWICK

THE ONLY QUESTION was, Whether the defendant was obliged to prosecute the writ of error in THE HUSTINGS, the mayor being judge of that court, and so make him both judge and party?

This case was twice argued the last Term;

And now THE COURT gave their opinion.

HOLT, *Chief Justice*, said, the writ of error would not lie before the mayor himself, because he was party, and so the bond void.

POWELL *contra*. He agreed, that regularly a man cannot be judge and party; but in cases of necessity he may: as if a real action be brought against all the Judges of the Court of Common Pleas. But this case differs from that, for THE HUSTINGS may be held before six aldermen, without the mayor (*a*), and then it shall be intended that the mayor was absent, because it does not appear of record. If the plaintiff in his replication had replied, that the mayor gave the judgment, I should have been of another opinion; and it does not appear that the mayor is a necessary part of the court.

POWYS and GOULD, *Justices*, were of the same opinion, that the writ of error was well brought, and so the bond good;

And the judgment given thereon in the court of common pleas was affirmed (*b*).

(*a*) 4. Inst. 247.

(*b*) On this judgment *Markwick* of king's bench was affirmed. S. C. brought a writ of error in the house of 1. Bro. P. C. 213.

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Case 213.

* The Queen against Apsley.

The keeper of a house of correction cannot be displaced by the sessions without cause. IT was moved to quash an order of sessions, for removing the keeper of the house of correction, it being to discharge him for divers and sundry crimes, not specifying what crimes in particular; and it was said, that place is not at the will of the justices, neither by the common law, nor by the statute (*a*).

CURIA. The justices have power to turn him out for misbehaviour, but not arbitrarily; they ought to have specified the cause in their order: and it was therefore quashed.

(*a*) 7. Jac. 1. c. 4. f. 4. and 9. See 22. Geo. 3. c. 64. f. 10. 24. Geo. 3. also 17. Geo. 2. c. 5. f. 31. and 33. sess. 2. c. 55. 31. Geo. 3. c. 46.

Anonymous.

Hilary Term, 6. Queen Anne, In B. R.

Anonymous.

Case 214.

NOTE.—In this Term, upon the motion of Mr. KING, two ^{Indictment.} indictments were quashed; because in the caption it was ^{Caption} said, "*per sacramentum duodecim proborum et legalium hominum* ^{pro} *burgo, &c.*" instead of *burgi prædicti*; so that it did not ^{quashed.} appear they were of the borough.

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1917

E A S T E R T E R M,

The Seventh of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

} *Justices.*

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* The Queen against Wrightson.

Case 215.

THE DEFENDANT was indicted for saying of *Sir Rowland Winn*, who was a justice of peace, these words, "*Sir Rowland Winn* is a fool, an ass, and a coxcomb, for making such a warrant, and understands no more how to make a warrant than a stick-head."

The defendant, being found guilty on the trial, moved in arrest of judgment.

MR. SALKELD for the defendant argued, that these words are not indictable, for that they only concern the person of the magistrate, and not the government. Indeed, if one reflects on a justice of the peace, either for his office or his honesty, it is a question whether an indictment lies; but this censures only this particular act. Besides it does not appear what the warrant was.

An indictment will not lie for saying of a justice of the peace "He is a fool, an ass, and a coxcomb, for making such a warrant, and understands no more how to make a warrant than a stick-head."

S. C. Salk. 698.
S. C. Holt, 354-
Post. 195.

1. Sid. 65.
Cro. Jac. 58.
2. Mod. 326.
3. Mod. 271.
10. Mod. 186.
12. Mod. 98.

414. 514.
1. Ld. Ray. 153. 2. Stra. 410. 617.

MR. EYRE for the queen argued, that the indictment was maintainable; for though this does not reflect immediately on the government, yet the government is obliged to maintain the instruments of its authority; besides the words censure him in the execution of his office, viz. as a magistrate; and he cited *Rex v.*

Easter Term, 7. Queen Anne, In B. R.

THE QUEEN
against
WRIGHTSON.

Hanson (a), and *Reg. v. Darby (b)*. This is not like reflecting on an officer in a corporation; for one is by commission immediately from the crown, and the other by election; the one reflects on the public government, and the other on the corporation only.

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* This being argued several times, THE COURT gave their resolution this Term, that the indictment did not lie.

HOLT, *Chief Justice*, said, he knew no case like this but *The Queen v. Darby (c)*. Indeed words spoken in disparagement of a justice's parts is a breach of good behaviour, but not indictable: besides the indictment does not set forth that this was a legal warrant; it ought to appear to the Court what sort of a warrant it was; for if it was a foolish warrant, or of a matter whereof he had no cognizance, it was lawful to say so. The words, perhaps, may be true, and justices of peace are not beyond censure.

POWELL, *Justice*, the same; and said, if the words were not indictable, they were much less actionable.

POWYS and GOULD, *Justices*, agreed.

And in this case were cited by HOLT, *Chief Justice*, 3. *Keb.* 492. 2. *Roll. Abr.* 78. 4. *Inst.* 181. and the case of *Langley* for abusing the mayor of *Salisbury*.

(a) *Hutton*, 131. S. C. Cro. Car. 503.

(b) 3. *Mod.* 139. S. C. Comb. 65. S. C. Carth. 14. S. C. Salk. 697.

(c) 3. *Mod.* 139. and see *Rex v. Langley*, 2. *Ld. Ray.* 1030. where an indictment for saying of a justice of the peace "You are a rogue and a rascal," was quashed on demurrer; and GOULD, *Justice*, in delivering the judgment of the Court, says, that the words in *Reg. v.*

Darby, "He is a buff-headed fellow; doth not understand the law; and hath not done justice," were held not indictable. See *vide* Salk. 697. Comb. 46. 66. *contra*; but in *Rex v. Pocock*, Trinity Term 14. & 15. *Geo.* 2. the case of *Reg. v. Darby* is denied to be law. See also *Prowse v. Wilcox*, 3. *Mod.* 163. and *Rex v. Penny*, 1. *Ld. Ray.* 153. *Reg. v. Shaftoe*, post. 195.

Case 216.

The Queen against Busheir.

An averment of "not born within the kingdom" does not imply that the party was born out of the king's allegiance.

AN INDICTMENT on the statute 1. *Rich.* 3. c. 3. whereby it is enacted, "that if any one out of the king's obedience exercise any trade here, they shall forfeit their goods and chattels."

The indictment was "*non natus infra regnum*;" which may be, and yet be within the queen's obedience:

And therefore it was quashed.

Case 217.

Turton against Prior.

HOLT absent.

Attornies of C. B. their privilege. 2. *Roll. Abr.* 274. cited by Mr. Fyre, and 275. by Mr. Raymond.

AN ACTION brought against an attorney of the court of common pleas, who was in the custody of THE MARSHAL of the king's bench, at the suit of another; and in this action they declare against him in *custodia marischalli*.

The

Easter Term, 7. Queen Anne, In B. R.

The defendant pleaded his privilege as an attorney of the common pleas, that he cannot be arrested in the court of king's bench.

TURTON
against
PRIOR.

THE COUNSEL for the plaintiff argued, that they might declare against the defendant so, because he was actually in *custodiâ mareschalli*.

But THE COURT directed, that the defendant * should be removed by *habeas corpus* to the common pleas, and that an action should be brought against him there.

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Starr against Rookby.

Cafe 218.

AN ACTION for not repairing of fences. The plaintiff declared "quod omnes tenentes et occupatores used to repair them."

A declaration for non-repair of fences, stating that all tenants and occupiers had been used to repair them, is good.

THE COUNSEL for the defendant said, that could not be good, because they could not lay the custom for *occupatores*, and cited the cases of *Faldo v. Ridge (a)*, *Dent v. Oliver (b)*, and *Stroud v. Byrt (c)*.

S. C. Salk. 335.

THE COUNSEL on the other side said, that "tenentes" may prescribe; and cited the case of *Holbach v. Warner (d)*, and *Book of Entries (e)*, and said that this way of pleading is used more now than formerly, and this is after judgment by *nihil dicit*.

But THE COURT seemed to incline that the prescription was not sufficiently laid (f).

(a) Yelv. 74. S. C. Cro. Jac. 206.

S. C. Noy, 129.

(b) Cro. Jac. 43. 122.

(c) 4. Mod. 418. S. C. 12. Mod. 97.

S. C. Skin. 621. S. C. 3. Salk. 12.

S. C. Comb. 370. S. C. Comy. Rep. 7.

(d) Cro. Jac. 665.

(e) Co. Ent. 140.

(f) See Rider v. Smith, 3. Term

Rep. 766. that in an action on the case for not repairing a private road leading through the defendant's close, it is sufficient to say, that the defendant as occupier of the close is bound to repair.—See also Blockley v. Slater, 1. Lutw. 119. Chapman v. Flexman, 2. Vent. 291. Rex v. Sir J. Bucknal, 2. Ld. Ray. 804.

The Queen against Lord Griffin.

Cafe 219.

LORD GRIFFIN being brought by *habeas corpus* to the queen's bench, upon his outlawry, desired Counsel to take exceptions to the outlawry.

The Court will not assign Counsel on an outlawry in treason, until the prisoner has shewed material error.

But POWELL, Justice, (HOLT, Chief Justice, being absent) denied it, and said, that though the statute 7. Will. 3. c. 3. gives Counsel in high-treason, at the trial, yet none is to be allowed after an outlawry, except the prisoner shew some particular error on which the Court may assign him Counsel (a); but the Court is his Counsel, and will do him justice (b);

Foster, 232. 4. Hawk. P. C. 367.

(a) See Burgess's Case, Cro. Car. 365. Rex v. O'Carney, T. Jones, 180.

(b) See Sir Robert Atkins' opinion on

this subject, 3. St. Trials, 758. Foster on High Treason, 231. Hawk. P. C. 4. vol. ch. 39. f. 2. and 4. Black. Com. 349.

Easter Term, 7. Queen Anne, In B. R.

THE QUEEN
against
LORD
GRIFFIN.

And on that execution was ordered to be awarded by *Rule of Court (a)*.

THE SOLICITOR GENERAL then moved that some time might be pronounced, which, he said, HOLT, *Chief Justice*, told him was most proper.

BUT THE COURT said the practice had been otherwise; and directed that a rule should be awarded *quod fiat executio* generally,

(a) See Holloway's Case, 3. Mod. 42. Stra. 553. Rex v. John Royce, 4. Burr. 2086. Rex v. Taylor, 2797. Rex v. Henley, 1. Burr. 642. Rex v. Athoe, Earl Ferrers, Foster, 140.

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Case 220.

* Billingsworth against Spearman, &c.

Quere, Whether an action of debt will lie against a husband alone for rent on a lease, to which he is only intitled in right of his wife?

1. Roll. Abr. 348.

1. Leon. 312. Palm. 343.

AN ACTION OF DEBT was brought against the defendants, whose wives were assignees of the term; it was brought only against the husbands: to which declaration there was a demurrer.

SIR EDWARD NORTHEY *for the defendants* said, the wives should have been joined in this action; and that the authorities were express (a), that if a lease be made to husband and wife, during the coverture, she must be joined; which is a stronger case than the present; for here the right is only in the wife; and the husband has no interest but in her right. In waste, if the wife be tenant for years or life, the action must be brought against both, though the husband only do the waste (b). And he shall not be chargeable in this case, by reason of taking the profits. Indeed when the title is not known of the landlord, *prima facie* taking the profits is good evidence; but not if it be shewn that there is an under-tenant by lease, &c.

WHITACRE *for the plaintiff*, cited 26. Edw. 3. 64. 562. 1. Roll. Abr. 10. H. 6. 11. F. N. B. 121. Keilw. 125. a. Ray. 6. 1. Lev. 25, 26.

HOLT, *Chief Justice*. If the husband be seised of land in right of his wife, which is charged with a rent-charge, the action for the rent arrear shall be brought against the husband only; but that differs much from this case, for that is by reason of taking the profits, for the rent is the profits of the land.

POWELL, *Justice*. This action is brought against them as assignees, in respect of the interest in the term; and differs widely from the case of a rent-charge; for that is only in respect of taking the profits.

Declaration in debt for rent, faulty.

HOLT, *Chief Justice*, then found a fatal fault, *viz.* that the assignee of the term had made an executor, who devised the tenements to the wives of the defendants, which could not be.

(a) Year-Book 2. Hen. 4. pl. 19.

(b) Cro. Eliz. 356.

Judgment

* Judgment was given on the last fault of the devise by executors;

BILLINGS-
WORTH
against
SPEARMAN.

Upon the opening of which point, *HOLT, Chief Justice*, said, he thought an executor could not waive a term: for if he accepted part of the executorship, he must accept the whole, as he stands impowered by the will. *Quere.* An executor cannot waive a term of years.

POWELL, Justice. If the rent be more than the term, he may shew it specially (a), and pray that he may be charged no otherwise than in the *detinet*.

Sed HOLT, Chief Justice, contra (b).

- (a) *Prattle v. King*, 1. Mod. 185. *Yelv.* 103. *Bolton v. Cannon*, 1. Vent. 271. *Billinghurst v. Spearman*, 1. Salk. 297. *Liddall v. Dunlop*, 1. Will. 4. 260. *Hellier v. Casbard*, 1. Sid. 266. S. C. 1. Lev. 127. *Howse v. Webster*,

Busshell against Haynes.

Case 221.

DEBT UPON A BAIL-BOND, as assignee of the sheriff of *Suffex*, according to the statute 3. *Anne*, c. 16. and declared generally, without shewing the matter specially, that it was a *sheriff's bond*, which by the act is assignable: to which there was a demurrer. Debt on a bail-bond must shew that the bond was assignable.

ET PER CURIAM, It should have been shewn that it was a bond assignable.

MR. SALKELD, when he found the opinion of the Court against him, prayed to *discontinue*, which was granted on payment of costs. Discontinuance on paying costs.

Lupart against Welfon.

Case 222.

AN ACTION OF COVENANT was brought on an agreement to refer all matters in difference to an arbitration. Submission to an award, imports a covenant to perform.

A difference arose about a certain demand, and the arbitrators awarded five hundred pounds to be paid, and general releases to be given.

It was argued, that though no express words were in the covenant, that the defendant should perform, yet it should be good by implication (a). For wherever there is an equitable interest, it is sufficient to submit to an award (b).

HOLT, Chief Justice. The very referring a thing to arbitration is a mutual undertaking, that each party shall * perform his

* [171]

- (a) *Dyer*, 216, 217. 8. Co. 82. 1. Roll. Abr. 7. pl. 13. *Allen*, 69, 70. 1. Lev. 113. 1. Sid. 160. 1. Vent. 69. *Lutw.* 575. (b) *T. Jones*, 158.

part

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LUPART
against
WELSON.

part of the award (a); for otherwise it cannot be said to be referred. Cannot one who is a stranger covenant that a third person shall perform the award between A. and B.? This indeed cannot bind the man to a performance, but it will be a breach of the other's bond. If a man assign a bond, and afterward bring an action thereon in his own name, this is a breach of the agreement; for the very assignment imports a covenant, that the assignee shall bring the action in the assignor's name, and recover and have the money to his own use. Antiently, if an award were made to pay a sum, this might have been pleaded in bar, though without satisfaction, because the law gave an action of debt for the money upon the award, and so a remedy. And though that law be now altered, yet now, when two persons submit to an award, this amounts to mutual promises.

(e) See 1. Ld. Ray. 122. 2. Ld. Ray. 961. 965. 1039. 1. Salk. 76. 6. Mod. 35. 222.

Case 223. The Parish of Oakham against The Parish of Whittlesea.

Justices of the
peace cannot
make a condi-
tional order of
removal.

AN ORDER was made by two justices to remove a poor man, "except he find security to be allowed by them," i. e. the two justices.

MR. PAGE excepted thereto, *first*, for that reason;

AND ALSO, that it did not say, that he was likely to become chargeable (a), or, that he came there to settle, not having ten pounds a year (b).

HOLT, *Chief Justice*. They cannot make a *conditional order*; "or, that in case he do not find security, then to remove him." For an order of removal is an adjudication, and ought to be *absolute*. And they have nothing to do with the security, for that belongs to the parish, and is not to be allowed, or disallowed, at the justices discretion.

MR. RAYMOND then moved to set aside the *certiorari*, by which the order was removed, because in the order the town was spelled "Oakham" instead of "Oakham," is no variance.

Sed non allocatur (c); and the *certiorari* was confirmed.

(a) See *Suddlecomb v. Burwash*, 2. Salk. 471. *Malden v. Fletwick*, 2. Salk. 530. *Anonymous*, Sett. & Rem. 39. *Reg. v. Waltham*, Sett. & Rem. 38. *Salk. 473*. *Reg. v. Rochville*, Sett. & Rem. 21. *Ufculm v. Clifthdon*, Burr. S. C. 138, *Rex v. Honiton*, Burr. S. C. 689.

(b) *Rex v. South Marston*, Str. 189.

(c) See *Beach's Case*, Cowper, 229, *Hart's Case*, *Cases Cro. Law*, 131.; and *Salk. 660*. *Dough. 194*, *mod.* 4. *Hawk. P. C.* 7th edit. 453.

* The Queen against Jay.

Cafe 224.

IN the beginning of this Term, a writ of *certiorari* was quashed, because it was directed "*justitiariis ad pacem assignat.*" omitting the words "*ad conservandam (a).*"

How a *certiorari* must be directed.

(a) For the direction of a *certiorari*, see 4. Hawk. P. C. 7th edit. ch. 27. l. 38.

The Queen against Atkins.

Cafe 225.

AN order of two justices was made on the father of a bastard-child, that he should pay one shilling and sixpence a-week from the time of the birth of the child until it be ten years old (a), and then to pay five pounds for the putting it out apprentice (b).

IT WAS OBJECTED, that the order was not according to the statute; for it is uncertain whether it will be chargeable so long as until ten years old. It ought to have been, "to pay so much &c. so long as the child is chargeable to the parish (c)."

Fort. 318.

Which THE COURT agreed; and therefore quashed the order.

(a) Reg. v. Collins, post. 178. Rex v. Barebaker, 1. Salk. 478. Reg. v. Smith, Sett. & Rem. 64. S. C. 1. Sess. Cases, 41. Rex v. Street, 2. Strange, 788.

(b) See Rex v. Willy, 1. Const's Poor Laws, 436. pl. 593. in point.

(c) Rex v. Johnston, Comb. 69.

The Queen against Digg.

Cafe 226.

MR. PAGE moved to quash a writ *de excommunicato capiendo*.

HIS FIRST EXCEPTION was to the *significavit* upon the *excommunicato capiendo*: That it did not therein appear, that the person was commorant in the diocese, and cited *Beaumont's Case (a)*.

The SECOND EXCEPTION was, That it does not appear there were forty days between the *excommunicato* and the *significavit*; that so the party may reconcile himself to the Church before the *excommunicato capiendo* issues (b). The *significavit* is recited in the *excommunicato capiendo*. This writ is returnable here, and after it is so returned (c), this Court may well quash it, if it be a bad writ; but before it is returned here, the chancery upon motion, if it be a bad writ, is to grant a *superfedeas* to it.

The *significavit* on an *excom. cap.* must shew the party commorant in the diocese.

1. Show. 16.

There must be forty days between the *significavit* and *excommunicato capiendo*.

As to which THE COURT ordered precedents to be searched.

(a) Moor, 467, 468.

(b) Cro. Car. 82.

(c) 1. Salk. 294. But see Rex v. Theed, that it may be superseded and

recorded and delivered out before the return, 10. Mod. 350. S. C. 1. Stra.

43.

A THIRD

Excommunication must be shewed since act of pardon.

A THIRD EXCEPTION was, That it did not appear that the excommunication * was since the last general pardon :

Which exception THE COURT seemed to allow.

Case 227.

The Queen against Haynes.

It must appear in a writ of excom. cap. that the crime was of ecclesiastical cognizance.

MR. PENGELLY moved to quash an *excommunicato capiendi*, for that it did not appear in THE WRIT that the crime alleged was of ecclesiastical cognisance.

RAYMOND *contra*: Though that matter do not appear in the writ, yet it appears throughout the proceedings, that this was a cause before THE DELEGATES, and therefore it shall be intended of ecclesiastical cognisance.

But THE COURT held, that it ought to have so appeared in the writ, and therefore that the writ was naught, and quashed it.

Case 228.

The Queen against Blower.

A writ of excom. cap. for matters ecclesiastical, without stating them particularly, is bad.

MR. KING moved to quash a writ of *excommunicato capiendi*, for that it only recited, to be for a matter of tithes or other matters of ecclesiastical jurisdiction, and did not set forth what matters particularly.

And the writ was quashed for the said uncertainty ; for its being laid disjunctively, "*or other matters,*" shewed that it might be for something else of ecclesiastical cognisance besides tithes ; and what that is does not appear.

Case 229.

The Queen against Cope.

An outlawry must state where the county-court was held.

A WRIT OF ERROR to reverse an outlawry. The error for which it was reversed was, because, in *secundo examinatio*, it does not appear where the county-court was held (a).

(a) See Year-Book 11. Hen. 7. pl. 10. Alder's Case. 2. Roll. Rep. 52. Rex v. Whiting, 2. Roll. Abr. 802. Rex v. Siclemore, 1. Keb. 50. Rex v. Tufton, 2. Keb. 128. Anonymous, 1. Vent. 108. Anonymous, 3. Mod. 89. Rex v. Oneby, 1. Show. 309. Rex v. John Wilkes, 4. Burr. 2564. Rex v. Barrington, 3. Term Rep. 500. Rex v. Yandell, 4. Term Rep. 521. 539.

Case 230.

* The Queen against The Corporation of Cornwall.

HOLT *absent*.

"Non fuit electus" is a good return to a *mandamus*.

"NON FUIT ELECTUS" is a good return to a *mandamus* (a). But to set forth that a burgess is *praefectus et juratus*, which is no more than that he is preferred and sworn to that office, is not good (b).

(a) See Salk. 434. Fitzg. 195. Rex v. Harwood, 2. Ld. Ray. 1405. (b) See Dougl. 79, 80. 5. Com. Dig. "Mandamus" (D. 3.). (D. 4.).

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The Queen *against* Dye.

Cafe 231,

HOLT *absent*.

NO INDICTMENT will lie on the Statute of Usury; for the method which the statute 12. Car. 2. c. 13. prescribes must be followed; therefore the indictment quashed (a).

No indictment lies on the Statute of Usury. Ante, 140.

(a) Wherever a statute prohibits the doing of anything, and prescribes a particular mode of proceeding against the offender, that mode only must be pursued, and not the common law method of indictment. See *Rex v. Penfax*, 1. Bar. K. B. 127. *Rex v. Wright*, 1. Burr. 544. *Stephens v. Watson*, 1. Salk. 45. *Hartley v. Hooker*, Cowp. 524. *Rex v. Robinson*, 2. Burr. 803. *Cater v.*

Knight, 3. Term Rep. 442.—The 12. Ann. c. 16. s. 2. against usury, gives a moiety of the forfeiture to him who will sue “by action of debt, bill, plaint or information,” and therefore an indictment will not lie, because that mode of proceeding is not mentioned in the statute. *Rex v. Upton*, Stra. 816. *Rex v. Cooper*, 2. Sess. Cases, 248. *Rex v. Smith*, Salk. 680.

Jenkins *against* Plome.

Cafe 232.

WHEN AN EXECUTOR brings an action as executor, where he need not name himself executor, and it goes against him, he must pay costs, as it was adjudged in the case of *Elways v. Mocatto* (a).

Costs by executors.

S. C. 1. Salk.

207.

S. C. 6. Mod.

91. 181. S. C. 3. Salk. 185. S. C. Holt, 313.

(a) In the case of *Elways v. Mocatto*, the plaintiff brought *assumpsit* for money of his testator had and received, after his death, by the defendant to the use of the plaintiff, as executor, and was nonsuited; and it was holden that the plaintiff should not pay costs, because he could not sue otherwise than as executor, and that it was immaterial whether the money was received by the defendant since the death of the testator or before. Salk. 314. 7. Mod. 48. 2. Ld. Ray. 864. But see S. C. cited Salk. 207. 6. Mod. 93. And

if this statement of the case be true, the doctrine it contains has been since contradicted, *Wallis v. Lewis*, 2. Ld. Ray. 1215. *Modely v. York*, ante, 135. *Jenkins v. Plumb*, 6. Mod. 91. 181. Salk. 207. *March v. Journey*, Andr. 359. and the rule mentioned in the principal case established, *Fernley v. Steel*, Hutton, 78. *Nicholas v. Killigrew*, 1. Ld. Ray, 436. *Portman v. Carne*, 1. Stra. 682. *Petrie v. Hannay*, 3. Term Rep. 659. *Cockerell v. Knyaston*, 4. Term Rep. 277.

TRINITY

TRINITY TERM,

The Seventh of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

* Wright against Sharpe.

* [175]

Case 233.

AN ACTION ON THE CASE for a *false return* to a *mandamus*; a verdict, and judgment for the plaintiff;

The Court will grant a *peremptory mandamus* after judgment for the plaintiff in an action for a *false return*, although a *bill of exceptions* was tendered at the trial.

A motion was made for a *peremptory mandamus*.

MR. PAGE opposed the motion; because a *bill of exceptions* was tendered for refusing a book to be given in evidence on the part of the defendant.

BUT NOTE, Nothing was mentioned of a *bill of exceptions* at the trial, nor anything done in it until after verdict.

S. C. Salk. 288.
S. C. Holt, 301.

POWELL, *Justice*, upon the making this motion, was of opinion, that whether the bill of exceptions was mentioned in time or not, that it should not stop a *peremptory mandamus*. If a motion had been made for a *new trial*, it would have hindered it; and a new trial would have been granted for refusing of evidence; but he said, if a writ of error had been brought, it would not stay the *peremptory mandamus*;

And therefore a *peremptory writ* was granted, PER CURIAM.

And

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A bill of exceptions, or the minutes thereof, must be tendered in writing at the trial, or the Judge may afterwards refuse to sign it.

And as to the tendering the bill of exceptions, he said, some minutes of it should have been drawn up at the trial, and the Counsel on both sides should see it, and set their hands to it, to put it out of all dispute afterwards. That the statute *Westminster the Second* says, "*scribat exceptionem*," which must be understood to be at the trial.

But this point was adjourned to be spoken to by Counsel.

Afterwards, at another day this Term,

* [176] MR. EYRE for the bill cited *The Register*, 182. where the writ to compel the * Judge to set his seal, mentions no time but when it should be demanded; and it is very probable, if it should be done at the trial, it would appear in the writ; he cited *Raft. Ent.* 293. *F. N. B.* 64. 66. *The Old F. N. B.* 21. *Letter N.* No notice taken of the time of the prayer of it. *Raym.* 404, 405. And besides, he said, the party was not aggrieved until after verdict.

PAGE also spoke to the same effect.

SIR EDWARD NORTHEY, against the bill of exceptions, argued from the inconveniencies that would attend such practice, if it should be allowed, that after a trial in a long Vacation they might come and tender a bill of exceptions, when the Judge who tried the cause had quite forgot the thing insisted on; and so no man that had a verdict could ever be secure.

MR. RAYMOND of the same side said, that this was a plain case, by the very words of the statute; and that minutes should be taken of it at the trial, just like a special verdict, and demurring to evidence. As to the objection made by MR. EYRE, that no time was mentioned in the writ in *The Register*, he said, it pursued the words in the statute *Westminster the Second*, c. 31. This case if it should be allowed would be of very ill consequence, upon this account: Suppose a dispute arise at the trial, whether such a one shall be allowed to be a witness for me, and upon debate the Court admits him to give evidence, and after the trial is over, you come and tender a bill of exceptions, because he was allowed evidence, I am hereby precluded from other evidence; whereas if you had mentioned it at the trial, I might have had evidence enough without him to have had a verdict, and so should not have insisted on him. If this practice be allowed, no man is safe, though he has a verdict.

* [177] HOLT, Chief Justice. If evidence be not allowed, and you have thoughts of tendering a bill of exceptions, minutes must be taken of it at the trial, and there is no need that it should be put into form: it is just like taking minutes of a special verdict; or demurring to evidence, the party must join in demurrer; but that is all in minutes. But * as to matter of form, that is done afterwards, and then when it is done it has a retrospect, as if it was done at the trial; and in this case the Judge is judge of the evidence,

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dence, and when he has given his judgment, if you say nothing to it, nor except against it, you submit to his judgment; and if you come after the trial is over, it is too late, for his authority is determined.—As to the inconveniency of such practice, he said, Suppose after the trial is over some time, the Counsel come and tender a bill of exceptions to the Judge, he, it may be, has forgot the thing insisted upon at the trial; the Counsel says he remembers it; and so, if the Judge do not remember it, an action shall be brought against him, and so the Counsel's memory shall arraign the Judge. He also said, when it is put in writing at the trial, it should be left with an officer of the court.

WRIGHT
against
SHARPE.

POWELL, Justice, said, it must be prayed at the time of the trial, when the exception is over-ruled; and the cause may go on nevertheless, for only the substance of the exception is to be taken down at the trial, without regarding form: and that "*scribat exceptionem*" must be understood to be done at the trial.

POWYS and GOULD, Justices, being of the same opinion with THE CHIEF JUSTICE and Justice POWELL, they refused to sign the bill; the cause being tried before them at Westminster, at THE SITTINGS for Middlesex.

Thompson against Pinchell.

Case 234.

AN ACTION was brought by husband and wife against the defendant, for goods taken out of their possession; the wife was administratrix.

A feme executrix must join with her husband,

MR. RAYMOND moved in arrest of judgment, because the goods having been in their possession, the wife should not be joined; and naming her executrix might have been left out of the case; and cited a case in the tenth year of William the Third, where the wife was executrix, and the defendant promised the husband, that if he would forbear he would pay; and the wife was not joined in that case.

* POWELL, Justice. In the case of husband and wife, it is certain the law gives the goods of the wife to the husband (a); but not when she is administratrix, because she has them *in autre droit*; and the husband here cannot bring an action on the judgment.

* [178]

Judgment for the plaintiff (b).

(a) Co. Lit. 351. Moor, 452. (b) See Anonymous, Salk. 282. 2. Atk. 104. 3. Atk. 526. 2. Willf. Weller v. Baker, 2. Willf. 414. Dunstan v. Burwell, 1. Willf. 224. 168.

The Queen against Collins.

Case 235.

AN ORDER of two justices was made upon Collins, the reputed father of a bastard-child.

An order on a reputed father to pay the child so much, and the mother so much a week, for ten years, is bad.

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THE QUEEN
against
COLLINS.

The order was, that he should pay the child twenty pence a-week, and the woman four pence a-week, for ten years.

MR. RAYMOND moved to quash it, because it should have been, "as long as the child is likely to become chargeable (a)," and not for a certain term of years (b); and he cited *The King v. James* (c); for it might be, that an estate might come to the child in the mean time, and it hinders the father from keeping it himself, if he has a mind to it.

The order quashed PER CURIAM (d).

(a) *Rex v. Johnston*, Comb. 69.

(b) See *Reg. v. Atkins*, ante, 172.

(c)

(d) See *Rex v. Burwell*, 1. Vent. 48.

Rex v. Barebaker, 2. Salk. 478. *Smith's Case*, Sett. and Rem. 64. *Rex v. Street*, 1. Stra. 788.

Case 236.

The Queen against The Inhabitants of Belzim, St. Paul's.

The justices cannot make an order on the overseers to pay a surgeon's bill for attending a pauper.

MR. RAYMOND moved to quash an order of sessions, which was made to pay a surgeon's bill, who had cured a poor person.

He urged, that the justices have no power to make such an order; for it was trying a *quantum meruit*.

HOLT, Chief Justice. If a surgeon cure a sick person that is poor, he must have his action against the overseers of the parish, and then the justices make an order to reimburse the overseers; but they cannot make such an order as this; for an action is the proper course.

Therefore quashed (a).

(a) See same point adjudged *Rex v. Smith*, 1. Const's P. L. 355. *Rex v. Woodsterton*, 2. Bar. K. B. 207. 247.

* [179]

Case 237.

* Willet against Boscomb.

Where a title is to be shewn in the declaration.

COVENANT was brought by an heir for rent against the assignee; but it was not set forth in his declaration, that his father was seised of any estate when he made the demise, only generally "*quod cum dimisit, &c.*" and THE YEAR-BOOK of Henry the Seventh (a), and the cases of *Scavage v. Hawkins* (b), and *Chittle v. Sammon* (c) were cited.

The defendant pleaded "*riens in arrear.*"

IT WAS MOVED in arrest of judgment, that this declaration was ill, not shewing a title in his father.

(a) 9. Hen. 7. pl. 3. b.

(b) Cro. Car. 571.

(c) Hutton, 55.

EYRE

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WILLET
against
BOSCOMB.

EYRES for the plaintiff said, the defendant's pleading "*riens in arrear*" admits that the lessor had title, and so is the Year-Book 34. Hen. 6. 486. If lessor bring debt for rent against the lessee, it is enough to say, *quod dimisit*. In the case of *Scavage v. Hawkins*, the heir counted that the father was seised in tail, but did not shew when the estate began, and yet it was held well.

HOLT, Chief Justice. The case of *Scavage v. Hawkins* is well on issue joined, because it shews the father was seised; and so it would have been well on demurrer.

POWELL, Justice. The case of *Chittle v. Sammon* in avowry, where it did not appear when the rent was due, the verdict helped it; but not in this case, when he is son and heir, and does not set forth a title in his father. I fear it is a fatal fault.

It was adjourned.

In Michaelmas Term following this case was again stirred;

And then HOLT, Chief Justice, said, Surely this declaration is naught. The plea says, the rent was not in arrear, but the declaration and the verdict say it was; and so the question is, Whether this is not helped by the verdict?

POWELL, Justice. If you entitle yourself to the reversion, you must shew that you are heir. But in an avowry perhaps you need not; because in that case if you had no title, he is a trespasser (a).

HOLT, Chief Justice. If a lessor brought debt, that perhaps might have been well, because the action there had been * upon the demise (b), and upon the *privity of contract*; but where the action is brought on *the title*, there the title must be shewn; and here the jury have found a title where no title appears: it will be hard to help this case by the verdict.

* [180]

And it was again adjourned.

(a) Searle v. Bunion, 2. Mod. 70. But see Lutw. 1492.

(b) See Wilkins v. Wingate, 6. Term Rep. 62.

Bourden against Alloway.

Case 238.

MR. EYRES moved in arrest of judgment, in AN ACTION on *Quare*, Whether the case, for causing him to be arrested and carried to prison without a cause, an action on the case, or trespass *vi et armis*, must lie for causing a person to be arrested and carried to prison without cause.

The exception was, that this ought to have been *trespass* and not *case*; that a man cannot change the nature of the action by laying it with a *per quod* (a).

WYNN, Serjeant, contra. A justice of peace has power, by warrant, to arrest a man; and if he do it wrongfully, *this* action lies against him, who maliciously causes this to be done.

(a) Leveridge v. Hoskins, post. 257. Courtney v. Collet, 1. Ld. Ray. 272. Savignac v. Roome, 6. Term Rep. 129.

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BOURDEN
against
ALLOWAY.

MR. BAINS took the difference between an action of *trespass* and on *the case*: he said, he had heard from this Court, that there is but little difference between the one and the other; and that almost all trespasses might be turned into actions on the case, at the plaintiff's election: but the true difference is this; TRESPASS is where there is an *immediate injury*; CASE, where the injury is *collateral (a)*.

MR. EYRES. It does not appear that he was arrested by any authority, and so it is a plain trespass.

PENGELLY said, that where the damage is immediate, yet the consequential damage thereon will not alter it from an action of trespass to an action on the case.

POWELL, *Justice*. We must keep up the difference of actions; and it will be hard to maintain this. But if a man by being imprisoned should have a *special damage*, as forfeiting a recognizance; or that he could not appear at such a day, *per quod* he was damnified, &c. there it must be *case*.

POWYS, *Justice*, was of the same opinion.

* [181] GOULD, *Justice*. This is coupled * with special matter, and it is laid to be done maliciously; therefore an action on the case lay.

PENGELLY. You may as well say, a man may maliciously assault and wound, and therefore an action on the case lies.

Adjournatur.

(a) Reynolds v. Clarke, Stra. 634. 1114. Hawker v. Birbeck, 2. Burr. S. C. 8. Mod. 272. S. C. Fort. 212. 1556. Gates v. Bailey, 2. Will. 313. Scott v. Shepherd, 3. Will. 499. 2. Bl. Morgan v. Hughes, 2. Term Rep. 225. Rep. 894. Shapcot v. Mugford, 1. Ld. Day v. Edwards, 5. Term Rep. 648. Ray. 187. Haywood v. Banks, 2. Burr. Savignac v. Roome, 6. Term Rep. 129.

Case 239.

Anonymous.

Trespass is local, but *trover* transitory, &c.

POWELL, *Justice*. There is a great difference between *trespass* and *trover*, as to the action being local, &c.; for trespass is local, but trover is transitory. Trover lies for trees, when they are cut down, because then they are chattels; but before they are cut down they participate of the nature of the land, and trespass lies. But suppose, after a man has cut down a tree, if he carry it away, cannot he be indicted for felony?

HOLT, *Chief Justice*. No (a), but trover lies for carrying it away, for it is a chattel so soon as it is severed from the freehold; and for the severing thereof trespass lies.

(a) See 1. Hawk. P. C. ch. 33. f. 34.

TRINITY

TRINITY TERM,

The Seventh of Queen Anne,

I N

The Common Pleas.

Thomas Lord Trevor, *Chief Justice.*

Sir John Blencowe, *Knt.*

Thomas Bury, *Esq.*

Robert Tracey, *Esq.*

} *Justices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Simon Harcourt, *Knt. Solicitor General.*

Abbot *against* Burton.

Case 240.

A BEING seised in fee, in right of his wife, of lands which she had by *discent*, on the *part of her mother*; the husband and wife by deed covenanted to levy a fine, which is thereby declared should be to the use of the conusees, and their heirs, to make them tenants to *the præcipe* in order to suffer a common recovery; and afterwards such recovery was had accordingly, which by the same deed was declared should be "to the use of the said *A.* for his life, and to his said wife for her life; and then to the first, and every other son of their two bodies in tail (male), remainder to the right heirs of the wife; with a PROVISIO or power for the wife, during the coverture, to dispose of the remainder (or reversion) in fee as she should think fit." *A.* and his wife die without issue, and without any disposition made by the wife of the said remainder or reversion, in pursuance of the said proviso or power.

A recovery suffered of an estate in fee simple will not alter the nature of the descent; and therefore if husband and wife, he being seised of lands in right of the wife by descent *ex parte materna*, suffer a recovery to themselves for life, with remainder in tail, remainder to the right heirs of

the wife, with a power to the wife to dispose of the reversion *in fee*, and they die without issue, and without making any disposition of the reversion, the estate shall descend to the heir of the wife *ex parte materna*. — S. C. Salk. 590. S. C. Comy. 160. 1. Will. 66. 74. 2. Stra. 1179. 4 Bro. P. C. 486. Harg. Co. Lit. 12, 13.

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ABBOT
against
BURTON.

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This case being found specially,

THE QUESTION WAS, Whether the lessor of the plaintiff, who claimed as heir to the wife on the part of the mother, had a title to these lands; or, Whether the defendant, who * claimed the same lands as heir to the wife on the part of the father, had a title to them?

The Court of Common Pleas unanimously gave judgment for the plaintiff.

TREVOR, *Chief Justice*, delivered the opinion of the said Court to this effect.—In the arguing of this case, it has been insisted on for the defendant, that there is a difference between a use resulting by implication of law, and a use limited by express words; and *Counden v. Clerk (a)*, and *Dyer*, . . . have been cited for that purpose; but we are to consider how this point stood before the statute of Uses. Before that statute, the law considered the *estate of the land* and the *use of the land* as two distinct things; and therefore before that statute, if a man had made a conveyance, either by deed of feoffment, or any other legal conveyance, he might therein by express limitation have declared the use of the land; or if there were no express limitation, the law gave it back to him again; for he was not to pass away the pernancy of the profits, without some consideration, or estoppel, by express limitation; so that a man might at common law have separated the use and the estate; and though the use and pernancy of the profits were neither created nor guided by the common law, yet the law took notice of them, and that *cestui que use* had a remedy by *subpœna*; so that this use was taken notice of as distinct from the land, even at common law: then comes the statute 27. *Hen. 8. c. 10.* and what alteration that made is to be considered. This statute executes the possession of the land in the same plight and manner as the use was before; therefore as this conveyance is, this antient use which results back, was not a new use; for it must be an old use (b), if it result back as not disposed of, and so much of the antient use still remain in him as was undisposed of. Now if the use would have gone this way before the statute, it will still go the same way since the statute. It is the same thing whether the antient use comes back by implication of law, or by limitation of the party; for that the construction of the law is founded on a supposal of the * intention of the party, and will convey and carry the use the same way as it is supposed the party would have done. Now if the law be so in the case of a resulting use, which arises by implication of law, what reason is there it should have a different construction where there is an express declaration of the party; especially since this declaration makes no alteration of the estate; and the other uses limited to *A.* and

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(a) Hob. 31. But see *Godbolt v. Freestone*, Salk. 591. and *Harris v. Bishop of London*, 2. Peer Wms. 138. where the case of *Counden v. Clerk* is denied to be law.

(b) 3. Lev. 406. 2. Salk. 59. and Note (64) to *Harg. Co. Lit.* (13. a).

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Assot
against
BURTON.

his wife, is only a new interest arising out of the conveyance only, because it is not so large an estate as the fee was before. But where the limitation is in fee it makes no alteration, because the one is as large an estate as the other. And it is still the same residue remaining in the wife which she had not disposed of before, that is, a part taken out of the whole, and of the same nature as the other was; and this appears so, not only from the reason of the thing, but there are other authorities also which seem to settle this point. 2. Roll. Rep. 78. 1. Co. 100. 2. Co. 91. 1. Inst. 22. And it is all one, whether this antient use in fee was created by implication of law, or by express limitation of the party, if it be of the same estate. In the case of *Godbolt v. Freeston* (a), these authorities are law. My Brother who argued for the defendant, endeavoured to difference this case from that in *Levinz*; and insisted on two things: FIRST, That this was not an immediate conveyance, as a feoffment to a man in fee, but that here was a covenant to levy a fine, which is to be to the use of the conusees, and their heirs, with an intent to have a common recovery; and hereupon the chief objection is, that not only the legal estate but also the use passed to the conusees, both in law and in equity: so that when a recovery was suffered, this use in fee must arise out of the estate of the conusees. This carries the case a step further than that in *Levinz*, and it is fit I should give an answer to it. Now this opinion seems to me to be grounded on taking this common recovery in a wrong sense; for this fine and recovery may

* be taken as two different distinct conveyances; and taking it as such, it is subject to this objection. But as it may be taken as two several, it may as well be taken as one single conveyance; and the deed, the fine, and the recovery, may well be taken as several parts of one and the same conveyance, which is the case in question, and easily resolved; for where such a conveyance is made by deed, fine, and common recovery, though the estate do move from one to another (as conduits), yet the estate originally moves only from the conusor, and the estate is always in a manner in him; as if the estate be declared to one for life, remainder in tail, and no limitation of the use of the fee, the use shall result back to the conusor, and not go to the conusees or recoverors. And so if there be a limitation of the use of the fee, that use shall and must arise out of the estate of the conusor, and not out of the estate of the recoverors. *Williams' Case* (b) in the queen's bench, is the same as this expressly. There was a power of revocation, and a covenant to levy a fine; and after that was done, it was questioned, Whether the fine levied had not destroyed the power? But it was held that the deed and the fine were but one conveyance, and not any destruction of that power, being contained as it were in one and the same deed, they both making but one conveyance, and from the very nature of the thing were to be esteemed only as several parts of one entire thing; and if the use be to the conusees

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A deed, a fine,
and a recovery,
but one conveyance.

(a) 3. Lev. 406.

(b)

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against
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Note.

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in fee, in this case it was not to give them an estate in the land, but in order to suffer a recovery; and their estates are determined by the recoveries being to them for that particular purpose only. But as I said, the estate moves originally from the conusor; what he has not parted with, is still in him, and therefore so much thereof as is not declared upon the recovery, shall be still to the old use; the nature of the common recovery being but as an instrument for raising of the use. The second thing insisted on for the defendant was, that here is a power reserved to the wife, and this it was said had altered the estate, it being subjected and subservient * to a new power; for that now she might dispose of it in another manner than she could do, had it been only her old interest. But I do not take this to be any new use, or to have altered the old estate (a): it is only a right (or power) of disposing of the inheritance, which otherwise she could not have done, this being only a new qualification of the old estate. Where an estate has a new qualification depending upon a new contingency, or where an estate is made liable to be disposed of in a new manner, such power, until it be executed, doth not alter the former use of the land. If she had pursued the power, no doubt all those uses had been new uses; because in such case there had been a new estate created out of the old estate, and they would have come in as if their estate had been particularly limited. But before that power is executed she has only her antient inheritance, and the former estate still exists. If a man convey an estate to the use of such persons as he shall appoint by writing, in the presence of *A.* and *B.* till he has executed this power the use of the fee is the same as it was before, and subject to be determined only by the execution of such contingent power, which by such new provision does subsist upon and affect the land, and till that be executed, he is tenant in fee as he was before. So if a man make an agreement to marry his son, and it is agreed that the use shall be to the man in fee, till the marriage takes effect, this is still the old use, but determinable upon a new contingency, which he hath subjected it to by this new conveyance; so that this power will not alter the estate at all; and until the power is executed in this case, she had her old estate in her, *i. e.* the residue of what she had not disposed of, which was the remainder in fee; which being derived to her *ex parte maternâ*, the plaintiff ought to have his judgment (b).

(a) See *Hurst v. Earl Winchelsea*, 2. Burr. 879.

(b) See *Price v. Langford*, 1. Show. 92. S. C. *Salk.* 337. S. C. *Carth.* 140. S. C. *Holt* 253. *Harris v. The Bishop of London*, 2. Peer. Wms. 139. *Armstrong v. Woolsey*, 2. Willf. 19. *Tregonell v. Strachan*, 2. Stra. 1179. S. C.

1. Willf. 66. S. C. from a manuscript note of Lord Kenyon, 5. Term Rep. 107. *notis.* *Alston v. Wells*, Dougl. 769. 771. *Hutchinson v. Hammond*, 3. Brown C. C. 128. and *Roe*, on the demise of *Crow v. Baldwere and Others*, 5. Term Rep. 104.

MICHAELMAS

MICHAELMAS TERM,

The Seventh of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

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* Bishop against Eagle.

Case 241.

ON A MOTION in arrest of judgment, that in a writ of *Account*, brought by the churchwardens of the parish of *St. Bartholomew*, in the city of *London*, against the defendant, judgment was given for the plaintiff, that the first judgment ought to be *quod computet*.

SALKELD said, the declaration supposes, that the defendant received several sums of money, *viz.* by the several persons herein after mentioned, the several sums herein after mentioned. That an action for an account ought to be a precise charge (a). That account ought to be certain; and that if part of the declaration be uncertain, judgment *quod computet* shall not be as to that, but only as to what is certain.

SECONDLY, They ought to be charged as receivers, and not as bailiffs, and cited the case of *Burdet v. Thurtle* (b).

THIRDLY, It was said, they ought not to be charged *per manus parochianorum*, but by *particular names*, for the greater certainty.

quod computet as to those which are good.—S. C. 10. Mod. 22.

(a) See Year-Book 43. Edw. 3. pl. 21. and pl. 23. b.

(b) 2. Lev. 126. See also Robert v. Andrews, Cro. Eliz. 83.

E contra,

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BISHOP
against
EAGLE.

E contra, The plaintiff is the present churchwarden, and the defendant is the last churchwarden; he is well charged as receiver; and if he should have been charged as bailiff, they ought to have pleaded it (a).

MR. EYRES *contra*. By the defendant's pleading "that he" was not churchwarden (b), he has admitted the charge in the declaration. 3. Keble, 425. 2. Lev. 126. 1. Roll. Abr. 391. Co. Lit. 172.

* [187]

* DEE, *Common Serjeant*. In an action of account against a receiver, it need not be charged by whose hands he received, &c. (c). And to avoid prolixity in the pleadings (d), the defendant ought to have demurred (e).

CHESHIRE, *Serjeant*, for arresting the judgment, urged, that if the nature of the action requires that particulars should be shewn, it is out of the reason of the cases about prolixity of pleading.

POWELL, *Justice*. Actions of account between merchants need not set out the particulars, *quasi dicat*; but otherwise here. A churchwarden must be charged as receiver; and the receipt is traversable, and you must say by whose hands, and go to the country; or else, if you do not say by whose hands, he may wage his law; because it shall be presumed to be from the hands of the plaintiff himself, and therefore in such a case he may wage his law. The allegation "*per manus parochianorum*" is very general; and he thought they ought to have set out the particular receipts of the particular persons: but if the case of *Burdet v. Thurl* be as it is cited, then "*per manus parochianorum*" will be as if they had not set out by whose hands at all (f). But the question is, Whether, by their taking issue upon a collateral plea, they do not come too late to except against the incertainty of the declaration, as it was determined in that case of *Burdet v. Thurl*.

HOLT, *Chief Justice*. They come now upon THE POSTEA'S being returned before judgment *quod computet*; and as to that part of the declaration which charges the receipt "*per manus parochianorum*," we may well abate it, for it is imperfectly charged and uncertain, and give judgment *quod computet* as to the rest.

(a) A merchant brought an action of account against his factor, and charged him as receiver of divers goods and merchandizes. The plaintiff had judgment *quod computet*, by default. The defendant pleaded before the auditors, and the plaintiff demurred to the plea, and judgment for the plaintiff. On a motion in arrest of judgment, HALE, *Chief Justice*, said, the defendant should have been charged as bailiff, but he should have demurred to the declaration, and cannot take ad-

vantage of it after judgment *quod computet*. *Burdet v. Thurl*, 2. Lev. 126.

(b) See S. C. 10. Mod. 22.

(c) Dyer, 183. b.

(d) Mints v. Bethel, Cro. Eliz. 749.

(e) 1. Roll. Rep. 391.

(f) Where a tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives it; otherwise he ought to be charged as bailiff, *Walker v. Holliday*, Comy. Rep. 272.

And

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And THE COURT abated it, as to the uncertain charge for the hundred pounds; and said, that if judgment *quod computet* had not been given, then he would lose the benefit of costs upon the plea of the collateral matter. 2.

BISHOP
against
EAGLE.

HOLT, *Chief Justice*, also said, *ley gager* was originally introduced for the benefit of the plaintiff; and that it was supposed the defendant would, upon the sacredness of his oath, discover more than the plaintiff could charge or prove; and therefore, unless the defendant in such case would purge himself by oath, the plaintiff should recover.

Reason of
swaging the law
being allowed.

* [188]

* The Queen *against* The Mayor, &c. of Hereford. Case 242.

SIR SIMON HARCOURT argued this case thus: There are three charges in this information. FIRST, For taking men *non in communitatem burgi*. SECONDLY, For taking men not of the town. THIRDLY, For making them free of the borough. The charter of *King Philip* and *Queen Mary* says generally, "that they make *omnes homines quoscunque*;" but no restrictive words are therein, and so it gives no more than the law gives. 10. Co. 92. *King James the First's* charter says, "not exceeding three." *King Charles the Second* grants them "to use, exercise, &c. in all and every such manner as theretofore they had done;" and this seems to restore *Queen Mary's* charter and to enlarge *King James's*; so that this issue about acting under *King James's* charter is immaterial.

Quare, Whether if a charter authorize a corporation to make "all men *libertate*" free, it authorizes the election of persons not belonging to the city.

MR. LUTWYCH. The charter of *King Charles the Second* has, by way of new grant, given them every privilege they had before. The question was, Whether there being no restrictive words in *Queen Mary's* charter, if thereby they might by law have taken in whom they had pleased, into their corporation, from any part of the kingdom, when the queen incorporated the men of such a place only? *Queen Mary's* charter grants them a power to make "*omnes homines quoscunque* tenants and inhabitants;" and the charter of *James the First* restrains them to three. *King Charles the Second* grants them "to exercise, use, and enjoy all privileges they at any time before ever used." It is objected, that the issue being upon *King James's* charter was immaterial, *Queen Mary's* charter being restored by the general grant of *King Charles the Second*.

Another objection is, that in the *distringas* it is not said in what cause. *Raft. Ent.* 330. 125. or 225.

HARCOURT, *Solicitor General*. The affirmative grant imports a restriction in the essential part of the corporation, and not to be compared to the cases of by-laws, &c.; for they are generally incident to all corporations; but this is particular.

POWELL,

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THE QUEEN
against
THE
MAYOR, &c.
OF
HEREFORD.
Note.

* POWELL, *Justice*. The question is, Whether this corporation can make persons free thereof who live out of the town?

HOLT, *Chief Justice*. As this corporation is constituted, all persons that are inhabitants are of the corporation as such; and he said they were freemen:

But POWELL, *Justice*, thought that would be of dangerous consequence, that by their mere coming and inhabiting there, they should gain a freedom.

Note.

But doubtless by the antient and common law, a residence for a year and a day within any free borough, made the party free of that borough: and though he was a villein before, he thenceforward became a freeman.

NOTE, This case was ordered to stand in the paper to be solemnly argued.

Case 243.

Ford against Offulston.

A devise "to
" my own right
" he rs male for
" ever," shall
extend only to
the heirs male of
the body of the
testator, and not
to a collateral heir.
S. C. 3. Salk.
336.

A DEVISE was to a man with several remainders; and a remainder over "to the heirs males of the devisor."

The question was, Whether a collateral heir male could take by this devise?

And THE COURT were clear, he could not; and the testator not having an heir male of his body at the time of his death, they held it a void limitation (a); and said, in the king's case of a grant to the heir male, it is void; but in that of a common person, it is a fee, and the word "male" is idle. For "heirs male, &c." in a will are always intended, "of the body," and imply an estate-tail (b).

Quere, See the case of *Pybus v. Mitford, &c.* (c).

(a) It was said by PARKER, Lord Chancellor, in the case of *Dawes v. Ferrers*, 1. Petr. Wms. 1 which was precisely similar to the present case, that this was so determined at trials at bar in every court in *Windsor-Hill*, and appeared to be so very plain a case, that in the king's bench the plaintiff's own Counsel would not ask for a special verdict. — Proc. Chan. 54.

(b) See *Couden v. Clark*, Hob. 31. *Southcot v. Sewell*, 1 Mod. 226. 237.

S. C. Freem. 216. S. C. 2. Mod. 207. *Starling v. Ettrick*, Proc. Ch. 54. *Dawes v. Ferrers*, 2. Petr. Wms. 4. *Brown v. Barkham*, 1. Stra. 35. *Willes v. Palmer*, 5. Burr. 2615. S. C. 2. Black. Rep. 687. *Gwynne v. Hook*, 8. Viner, 317. pl. 13. and see Mr. Hargrave's Note (3) to Co. Lit. 24. b.

(c) 2 Lev. 75. Raym. 228. 1 Vent. 372. 1. Mod. 121. 159. 3. Keb. 239. 316. 338. 1. Freem. 351. 369.

The

The Queen against Prew.

Cafe 244.

SIR PETER KING moved to quash an indictment against a *serge-maker*, for dyeing his own serges, he not having served as an apprentice to the dyeing trade; for that it was not laid in the indictment, that he was "a common dyer," and that he might lawfully dye his own wool; and he said, it was so adjudged in a case, where because * it was not laid a common baker, it was held ill (a); for any man may bake for himself, and so he may dye, &c.

A *serge-maker* may be indicted on 5. *Eliz.* c. 4. for using the trade of a *dyer*, in dyeing his own serges, if he has not served as an apprentice to the trade.

But THE COURT held the indictment well enough, being not like the case of a baker; for many people bake their own bread (b), but a dyer is a separate trade. * [190]

And HOLT, *Chief Justice*, cited a case, where a *comb-maker* was indicted for exercising the trade of a *horn-presser*, though he used horn for making his combs; and it was adjudged it lay, because it was a distinct trade (c).

(a) Moor, 886. Hob. 183. 2 Roll. 1. Show. 242. 266. S. C. 2. Salk. 610. Rep. 376. S. C. 3. Mod. 313. Hunter v. Moor,

(b) 8. Co. 129. 11. Co. 54. Cro. Noy, 133. French v. Adams, 2. Wilf. 168. 1. Bl. Rep. 233.

(c) See Hobbs *qui tam* v. Young,

Walker against Atwood.

Cafe 245.

AN ACTION was brought on a bill of exchange. The bill was drawn the eighth of April 1707, upon Atwood, to pay fifteen pounds to Godfrey; the bill being shewn to Atwood, he promised to pay it on the eighteenth of April 1707. Afterwards this bill was assigned to Walker, who brought this action, and declared on the custom, &c.

Upon a demurrer to the declaration,

MR. SALKELD for the defendant said, that the bill being to pay a sum of money, and no day said when it should be paid, it must be paid on sight; therefore this promise to pay two or three months after, viz. the eighth of September, is a new agreement, and consequently the action must be founded on the new agreement, and not upon the custom of merchants.

If a bill of exchange be drawn on A. without mentioning at what time it is to be paid, a *parol* promise by the drawee to pay it at any subsequent day, is a good acceptance within the custom of merchants.

POWELL, *Justice*. The custom of merchants is by the acceptance, and a promise to pay at such a time is good, and he is bound by the custom of merchants, by acceptance, to pay at the time appointed (a), and therefore the plaintiff has declared well on the custom of merchants; and if it should not bind him on the custom,

(a) See *Wegerstoffe v. Keene*, 1. Stra. 215. 220. *Petit v. Benson*, Comb. 452. *Bishop v. Chitty*, 2. Stra. 1195. *Jack-son v. Pigot*, Salk. 127. *Mitford v. Walcot*, 1. Ld. Ray. 574.

it

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WALKER
against
ATWOOD.

it would not at all, because no *indebitatus assumpsit* lies on the acceptance.

Judgment was given for the plaintiff, *nisi* : by POWELL, POWYS, and GOULD, *Justices* ; HOLT, *Chief Justice*, absent.

* [191]

Case 246.

* Anonymous.

A soldier in custody on an *excommunicato capiendo* shall be discharged.

A MAN being excommunicated for non-payment of costs, in a suit for tithes in the court christian,

MR. LUTWYCH moved to discharge him, he being in custody upon an *excommunicato capiendo*, because he was enlisted a soldier according to the act of parliament, which says, " If any person " being in custody upon any process, &c."

THE COURT did not discharge him upon this motion :

But afterwards, it being moved again,

HOLT, *Chief Justice*, said, Since the Judges of the court of common pleas are of opinion, that a man in execution shall be discharged, being enlisted as a soldier, a man in execution on an *excommunicato capiendo* is within the same reason ;

And therefore BY THE COURT he was discharged.

But he said, he never was of opinion, that this act should extend farther than *mesne process*, and not to persons in execution (a).

(a) See *Masfall v. Davies*, post. 234. *Mason v. Vowson*, post. 252.

Case 247.

Wells against Ferguson.

If the condition of a bond be repugnant, the bond is single.
S. C. post. 199.
S. C. 2. Salk. 463.

DEBT for fifteen pounds brought by *Alexander Ferguson* against *Tho. Wells*, on a bond dated the twenty-sixth of October 1705.

Upon oyer of the condition, it was set forth, " WHEREAS *John Wells*, the son of the said *Thomas Wells* the plaintiff, did put himself apprentice to the said *Alexander Ferguson* for seven years ; " AND WHEREAS the said *John Wells* is desirous to be acquitted of the said apprenticeship, and to have his said indentures delivered up ; AND WHEREAS the said *Thomas Wells* and *Alexander Ferguson* are agreed, that for and in consideration of the delivery up of the said indentures, and acquitting the said *John Wells* of his apprenticeship, he the said *Thomas Wells* has paid unto the said *Alexander Ferguson* two guineas in gold ; and has agreed to pay off or otherwise indemnify the said *Alexander Ferguson* of and from the payment of a certain note given by the said *Alexander Ferguson* to one *Charles London*, the former master of the said *John Wells*, for * payment of four pounds to *Charles London*, &c. NOW THE CONDITION of this obligation is such, that if the said *Thomas Wells*, his executors and administrators, " shall

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"shall and do, before any suit or action brought, &c. by *Charles London*, his executors and administrators, &c. on or by reason of the said note against the said *Alexander Ferguson*, his executors, &c. cause or procure the said note to be delivered up to the said *Alexander Ferguson*, his executors, administrators, &c. to be cancelled, or otherwise that the said *Alexander Ferguson* be sued and compelled to pay the said sum of four pounds to the said *Charles London*, his executors, &c. and that he the said *Thomas Wells*, his executors, &c. do not then immediately repay such sum of four pounds to *Alexander Ferguson*, his executors, &c. with all costs, charges, and satisfaction of all damages sustained by reason thereof, or the prosecution thereupon, he or they having notice left of such prosecution; then the obligation to be void and of none effect, or else to stand, remain, and be in full force and virtue."

WELLS
against
FERGUSON.

After verdict, it was moved in arrest of judgment:

And MR. RAYMOND for the defendant said, the plaintiff had no cause of action; for the condition being in the disjunctive, the defendant may perform which part he will, and here he has performed the latter part, viz. he has not repaid the money; and the condition of an obligation shall not be construed contrary to the express words, though the parties intend otherwise: and to maintain this, he cited *Colethurst v. Bedjuffin* (a), *Needler v. Guest* (b), and the case of *Ingledeu v. Crisp* (c), which was debt on a bond penal, reciting, that the plaintiff had agreed to sell the defendant so many stacks of wood, and the defendant covenanted to pay for every hundred stacks thirty-five pounds. An action was brought for three hundred and ten pounds, for so many one hundred and fifty stacks; and on demurrer, judgment was given for the plaintiff; because the agreement being for every hundred, and not said *secundum ratam*, he could not recover. And the case of *Vernon v. Alsop* (d), which was debt on a bond, conditioned to pay seven pounds by two shillings a week until the seven pounds is paid; and if he fail of payment of the two shillings at any of the days it ought to be paid, the obligation to be void; and it was adjudged, that the condition shall be taken distributively (e). * But for a case in point he cited the Year-Book of *Henry the Sixth* (f), where was *Littleton's* opinion, that if a man bind himself in an obligation of one hundred pounds, where the condition is, that if the defendant do not pay the obligee ten pounds, that the obliga-

5. Co. 22. b.

* [193]

(a) Plowd. 30.

(b) Allen, 9. S. C. Stiles, 12.

(c) 2. Ld. Ray. 314. S. C. 7. Mod. 77.

(d) 1. Lev. 77. S. C. 1. Keb. 306. 416. 451.

(e) "That is," continues the Book, "by referring particulars to particulars, viz. that if he paid the seven pounds the obligation should be void, but if he failed of paying the two shillings at any of the days it should be in full

"force, for that the obligation shall not be of no effect, if by any means it may be made good." See also S. C. 1. Sid. 105. that it was adjudged that the obligation was single, and the condition repugnant and void, S. C. Ray. 68. adjudged for the plaintiff, because the condition is senseless, and then the obligation is in full force and single.

(f) Year-Book 34. Hen. 6. pl. 10.

tion

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WELLS
against
FERGUSON.

tion shall be void, this shall avoid the obligation, though the intent was otherwise; because the words of the condition must be observed.

MR. WILLIAMS for the plaintiff said, that if the condition be not, that he shall pay off that which the bond is given to secure, the condition is inconsistent. Besides, it is recited in the condition of the bond, that it is agreed the defendant shall pay off the note or indemnify; therefore it is plain it is a repugnant condition, and the rule is, that when the condition is repugnant and insensible, the obligation is single; to prove which he cited *Maleverer v. Hawkley* (a), and the case of *Vernon v. Alsop* (b).

HOLT, Chief Justice. The condition is, that if he deliver up the note before it be put in suit, or if it be put in suit, and the plaintiff forced to pay, and then if he do not repay the money the obligation to be void, &c. this is a contradiction and repugnancy.

POWELL, Justice. The case in the Year-Book is as MR. RAYMOND has put it; but that differs much from this, for there was no repugnancy. But here the recital in the former part of the condition is repugnant to the latter part.

Upon this argument it was adjourned with a *Curia advisare vult* until another day in this Term; and then

THE COURT gave judgment for the plaintiff (c).

And HOLT, Chief Justice, said, the condition was repugnant; and no difference between this and the case of *Vernon v. Alsop* (d). And he said the case in the Year-Book of *Henry the Sixth* (e) was not law.

(a) 2. Saund. 78. S. C. 1. Mod. 35.

S. C. 1. Vent. 39.

(b) 1. Lev. 77. S. C. 1. Sid. 105.

S. C. Ray. 68.

(c) See Trott v. Spurling, Moor, 811.

Wells v. Wright, 2 Mod. 285. Holmes

v. Ivy, 2. Show. 16.

(d) 1. Lev. 77. 1. Sid. 105.

(e) 34 Hen. 6. pl. 10. AND NOTE

this case was doubted by SIR FRANCIS NORTH in the case of *Wells v. Wright*, 2. Mod. 285.

* [194]

Cafe 248.

Bendish against Lindsey.

If, during the election of a member of parliament, a voter, in the presence of the candidate, hold up money in his hand, and say, "Theft-guineas are Mr. A.'s (the candidate); they were given to me to vote for him; he has bought my vote; and he shall have it;" the words are actionable.

THE PLAINTIFF declared, that he being *bonus, verus, honestus, probus, et fidel. subdit. et ligeus Annæ reginæ, &c.* and having good interest among the burghesses of the borough of Cambridge, and standing as a candidate * for that borough, the defendant " *existens burgenfis ejusdem burgi Cantabr. et habens suffragium in electione et retorno burgensium parliament. pro burgo præd. in parliament. deservitur. præmissor. non ignarus, sed machinans et malitiôsè intendens ipsum* the plaintiff *minus rite prægravare, &c.*" and to hinder him from being chosen, holding in his hands three guineas,

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BENDISH
against
LINDSEY.

guineas, in the presence of many people, burgesses of the said borough of Cambridge, *tunc et ibidem palam, publice, falsè, et malitiosè dixit, et asseruit, et propalavit de eodem* the plaintiff, *hæc falsa, ficta, malitiosa et opprobiosa verba Anglicana sequentia, viz.* "these guineas (INNUENDO *præd. has pecias auri cuneat*. VOCAT. guineas;) and two more (INNUENDO *duas al. pecias auri cuneat*. VOCAT. guineas, and two half-guineas) are Mr. Ben-*dis's* (eundem the plaintiff INNUENDO), his money, and were given me to vote for him, and he has bought (INNUENDO *suffragium ipsius* the defendant), and he shall have it."

Upon issue joined, and a trial and verdict for the plaintiff, it was moved in arrest of judgment, *viz.* exceptions were taken by

MR. THOMPSON for the defendant,

FIRST, That these words are not actionable; for no words are actionable except they subject the plaintiff to a temporal punishment, or a special damage, and here is nothing spoken that will subject the plaintiff to an indictment on the statute. And Lord Coke (a) says, bribery is when one takes a fee in a judicial place.

SECONDLY, That the words are insensible, for when the plaintiff has given the money to the defendant, it cannot be the plaintiff's money.

THIRDLY, That it is not averred through the whole pleading, that the plaintiff did not give the money, &c.

FOURTHLY, That the sheriff *præceptum suum misisset majori præd. burgi Cantabr. ad eligend. et returnand. duos burghenses ejusdem burgi ad essend. et deserviend. pro burgo præd. in parlamento illo, &c.* and it should be to the mayor and burgesses; and (ergo) the speaking these words is no offence, in case of such an election.

HOLT, Chief Justice. It need not be averred that the plaintiff did not give the money to the defendant to vote for him, for it is said, *hæc falsa, ficta, malitiosa verba*, which * is well enough. And as to the precept being directed to the mayor to chuse, and not said to cause to be chosen, he said, it was well enough after verdict; because it must be proved at the trial that the election was made by the burgesses. And as to the merits of the cause, he was clear of opinion that the action lay.

* [195]

And judgment was given for the plaintiff, *per* HOLT, Chief Justice, POWYS and GOULD, Justices; POWELL, Justice, absent.

(a) Co. 145.

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Cafe 249.

The Queen against Shaftow.

An indictment will not lie for saying of a justice of the peace, "You are an informing rogue, rascal, and villain." Ante, 166.

INDICTMENT for saying, "You are an informing rogue, an informing rascal, and an informing villain," knowing him to be a justice of the peace.

MR. LUTWYCH moved to quash this indictment.

And **PER CURIAM** it was quashed *nisi*, the end of the Term; for words said of a justice of peace are not indictable, according to the late resolutions between *The Queen v. Wrightson* (a).

(a) See ante, Easter Term, 7. Ann. what is called *discretio Curiae*.—NOTE in page 166.—*Sed quare*, for this point is former edition. very unsettled, it depending much on

Cafe 250.

Bennet against King.

A prohibition granted for saying "she has made her husband a cuckold," on a suggestion that the words were spoken in London.

Andr. 300.
2. Wilk. 72.
4. Bac. Abr. 521.
2. Term Rep. 473.

A. SAID to **B.** that "she made her husband a cuckold;" **B.** libelled against **A.** in the spiritual court.

MR. SOUTHOUSE moved upon suggestion, that the words were spoken in London; and though it is not calling her "whore" directly, yet it is calling her so by implication.

HOLT, Chief Justice. If the custom of London extend to punish a woman who makes her husband a cuckold, then a prohibition may be granted; for the foundation of granting a prohibition, for calling a woman "whore" in London, is, because they by custom punish whores there by carting them; and an action lies there for calling a woman "whore."

And afterwards, at another day this Term, they granted a prohibition, because these words are actionable in London (a).

(a) *Vicars v. Worth*, Stra. 471. S. C. Andr. 7. *Hodgkin v. Corbet*, Argyle v. Hunt, Stra. 187. *Cook v.* 8. Mod. 114. S. C. 1. Stra. 545. *Wingfield, Fort.* 347. S. C. Stra. 555. *Staunton v. Jones*, Dougl. 380. *notis.*

* [196]

Cafe 251.

* Tate against Whiting.

Promise to the intestate, and a promise to the administrator joined, *remititur damna* to one helps it.

ASSUMPSIT upon several promises brought by an administrator *cum testamento annexo*; two whereof were made to the intestate, and the third laid thus: Whereas the defendant Tate was indebted to the intestate, and letters of administration granted to the plaintiff; he the defendant, in consideration that the plaintiff would forbear to sue, promised to pay.

This was in error out of the court of common pleas.

MR. WHITACRE for the plaintiff in error said, that these promises could not be joined; for that the last promise is made to the administrator

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administrator himself; and it is a question, whether the *remittit damna*, which was entered after verdict, will help it; and cited the case of *Rogers v. Cook* (a).

TATE
against
WHITING.

HOLT, *Chief Justice*, said, he would not allow that Book as an authority. But yet he admitted, that these promises could not be joined, and upon a demurrer it had been ill; but now the *remittit damna* has cured it (b); for if the husband and wife join in an action of battery, for the battery of both, if the defendant be found "not guilty" as to the husband, and guilty *quoad* the wife, and a *remittit damna* be entered as to the husband, it is good, though *prima facie* they could not join (c); and so in this case.

Judgment was affirmed (d).

(a) 1. Show. 366. S. C. Salk. 10. S. C. Carth. 235.

440. Owen, 82. *Contra*, Yelv. 89. Cro. Jac. 538. Cro. Car. 90. Gripps v. Ingledew, 7. Mod. 88.

(b) But see *Rose v. Bowler*, that where the cause of demurrer to a declaration is, that the counts are improperly joined, the plaintiff cannot enter a *molle prosequi* as to some and leave others remaining, 1. H. Bl. Rep. 109.

(d) See accordingly *Jones v. Wilson*, post. 256. *Hooker, Executrix, v. Quilter*, 1. Wils. 172. S. C. 2. Stra. 1271. *Petrie, Executor, v. Hannay*, 3. Term Rep. 659. *Jennings v. Newman*, 4. Term Rep. 347.

(c) *Vide accord.* Cro. Jac. 501. *Jones*,

Bushel against Burland.

Case 252.

IN EJECTMENT on a special verdict, the case in short was: *A* and *B*. his wife, levied a fine; and four years after they made a deed to declare the uses, in which there are these words, "All and every fine or fines levied, or to be levied, shall be to the uses of the deed."

A deed declaring uses, dated before and executed after a fine levied, is good, if it appear that the fine was levied to the uses therein declared.

This case was argued in *Easter Term*, in the seventh year of *Queen Anne*, by SERJEANT PRATT and SERJEANT HOOPER, and adjourned to this Term.

* [197]

* PRATT, *Serjeant*, argued, that the fine was good; for though the deed was long after, and these words, "all and every fine or fines, levied or to be levied, shall be, &c." yet the jury find that it related to the fine before levied, and insisted on *Dowman's Case* (a).

S. C. Holt, 733.
5. Co. 26.
9. Co. 10.
Comb. 429.
2. Salk. 677.
2. Roll. Abr. 799.
1. Atk. 7.

HOOPER, *Serjeant*, argued, that *Dowman's Case* was before the statute of Frauds and Perjuries (b), when declarations of uses might be by parol; and made several differences between this and *Dowman's Case*; and if this was good, where was the freehold all the while between the levying of the fine and the execution of the deed? and besides, by the words of the deed, it is plain it related to a subsequent fine; and he said, that the verdict does not signify anything here; for if the jury find what is not law, it does

(a) 9. Co. 7. *Dyer*, 136. 2. Roll. Abr. 782.

(b) 29. Car. 2. c. 3. See *Sanders on Uses*, 213.

Q 2

not

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against
BURLAND.

not avail; as suppose they had found the that declaration of uses had been by parol.

HOLT, *Chief Justice*, and THE COURT said, that the first fine would be to no use, if this deed do not relate to it; and *Bekwith's Case (a)* says, it shall be good if the wife do not declare the contrary: if a fine be levied by husband and wife in Vacation, and they make a deed of uses of a fine levied in *Trinity Term* (as in judgment of law it is), it is good, though since the statute of Frauds and Perjuries; and there is the same objection as to the freehold being in abeyance, and the time does not make any alteration. Or if a man levy a fine, and the deed is lost, and four years after he make another deed, the fine is good. The statute of Frauds and Perjuries is out of the case; for it is thereby declared "that all subsequent deeds shall be as they were before."

Sed adjournatur.

HOLT, *Chief Justice*, afterwards delivered the opinion of the Court.—The question is, this deed bearing date before the fine levied, and not executed till after, and the jury having found that the fine was levied to the uses therein declared, Whether it is sufficient to declare the uses of the fine? We are all of opinion that it is. We think that, notwithstanding the statute of Frauds and Perjuries, a subsequent deed is now as good as it was before the statute. It is doubtful whether that statute extends to uses, because they are not mentioned there, but only trusts; notwithstanding we take trusts and uses to be the same, in respect of trusts in their larger extent, and so within the statute of Uses. Here is what the statute requires, for here is a writing, and here is a deed. If you consider *Dowman's Case*, *Moor*, 191, 192. you will find this to be much stronger; for the jury there found, that the deed of uses was subsequent, and the question was, Whether the deed was sufficient to declare the uses? And in that case it was objected, that there was a limitation of the use, without any impeachment of waste, which cannot be without deed. At the time of granting of the reversion there was no deed; but when the deed came, and declared the intent of the party, then it was a sufficient manifestation of the use, and the intent of the party. And it is true, waste could not be punishable without deed; but when the deed came, and made good the use, it was well enough. The jury here have expressly found, that it was the intent of the parties at the time of levying the fine, that it should be to those uses. In *Basset's Case*, *Dyer*, 136. pl. 17. there was a recovery suffered, in the sixteenth year of *Henry the Eighth*, and the uses were not declared till the twentieth; though it was before the statute, yet it was the same thing, and that is held a good declaration of the uses.

Judgment for the plaintiff (b).

(a) 2. Co.

(b) *Nightingale v. Ferrers*, 3. Peer. Wms. 203.

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Langthorn *against* Taylor.

Case 253.

ERROR on a judgment in the court of common pleas in debt upon the return of an *elegit*. Execution taken out pending a writ of error.

The declaration was, That *M. Clayton* by indenture demised a house, and certain goods mentioned in A SCHEDULE, for twenty-one years, if* the said lives so long live; that the plaintiff recovered a debt of three hundred pounds against her, and execution thereon.

* [198]

RAYMOND excepted, that the execution was taken out pending a writ of error; and that all the precedents are, that it ought to appear to be with an *affirmetur* (a). And that it not appearing here that the judgment was affirmed, it is erroneous.

HOLT, *Chief Justice*. It must either be a *non prof.* or an *affirmance*. You have indeed shewn, that the execution was suspended by the writ of error, and therefore they ought to have shewn a declaration before they took out execution.

(a) 1. Saund. 182. 233. 2. Saund. 238 or 233. and 317.

Butler *against* Cozens.

Case 254.

SIR PETER KING moved to have full costs in an action of In trespass *inter alia* for breaking his lock upon his gate; and *inter alia* for breaking a lock upon a gate, there shall be no more costs than damages, unless the Judge certifies. cited an *Anonymous Case* in *Ventris* (a), and the case of *Barnes v. Edgard* (b).

CURIA. Had it been for taking away the lock, full costs might have been given.

POWELL, *Justice*. But this seems to be laid as a trespass in order to try the title; and where the freehold comes in question (c), there it is held full costs shall be; but where the freehold does not come in question, there no more costs than damages. But if the Judge certify the trespass to be voluntary and malicious, there the costs are to be full, by statute 22. & 23. *Car.* 2. c. 9.

But it was adjourned (d) to see if the Judge who tried the cause would certify (e).

(a) 2. Vent. 215.

(b) 3. Mod. 40.

(c) 1. *Ld. Ray.* 76. 2. *Salk.* 665.

(d) It is said that it was held within the statute; for the locks were fixed to the posts and the posts to the freehold, *S. C.* 6. *Vin. Abr.* 357. in margin. See also *Reynolds v. Osbourne*, 5. *Mod.* 74. *Mitchell v. Soaper*, *Bunb.* 167. *Hill v. Reeves*, *Bull. N. P.* 329. *Birch v. Daffey*, *Bull. N. P.* 330. *Higgins v. Jennings*, 2. *Ld. Ray.* 1444. *Blunt v. Mither*, 1. *Stra.* 645. *Stileman v.*

Patrick, 2. *Mod.* 141. *Lord Dacre v.*

Tebb, 2. *Black.* 1151.

(e) See *Reynolds v. Edwards*, that if it appear on the trial, that the trespass, however small, was committed after notice, and the jury give less than forty shillings damages, the Judge is bound, under the statute 8. & 9. *Will.* 3. c. 11. s. 4. to certify that the trespass was wilful and malicious, in order to intitle the plaintiff to his full costs. 6. *Term Rep.* 11.

2. *Vent.* 48.

Comb. 324.

5. *Mod.* 74. 316.

Bunb. 167.

Bull. N. P. 330.

1. *Stra.* 577.

3. *Burr.* 1282.

Tidd's Pract.

649.

Dougl. 779.

Case 255.

Withers *against* Baker.

Declaration amendable, &c.

HOLT, *Chief Justice*, declared, that by the course of the court, a man may amend his declaration the second Term; but that when the declaration is amended, new rules for pleading must be given; for the plaintiff perhaps must thereby be put to a new defence.

* [199]

SECONDLY, That the plaintiff the second Term may amend, but cannot change * the *venue*, though issue be not joined, nor in any case afterwards; for in transitory actions the plaintiff has his election to lay his action where he pleases; therefore he shall not change it, though the defendant may, on cause shewn.

Case 256.

Wells *against* Ferguson.

If the condition of a bond be repugnant, the bond is single.

S. C. ante, 197.

S. C. 2. Salk. 463.

ABOND was for a hundred pounds, with a condition, that if he did not pay fifty pounds by such a day, the bond should be void.

THE COURT adjudged the condition to be repugnant, and the bond to be single. 2. *Lev.* 77.

NOTE, In this case HOLT, *Chief Justice*, denied the case in the Year-Book 39. *Hen.* 6. fo. 10. a. to be law.

Case 257.

Adams *against* Hincloe.

Copyholds entailable without special custom.

Co. Copy. f. 48.

4. Co. 87.

5. Co. 52.

1. *Lev.* 136.

Cro. Eliz. 717. 907.

UPON A SPECIAL VERDICT the question was, Whether a copyhold could be entailed, without laying a special custom for so doing?

AND IT WAS ADJUDGED by the whole Court, that it might.

And HOLT, *Chief Justice*, rejected the notion of my Lord Coke (a), about the statute *De Donis* co-operating with the custom; and held that that statute turns all those estates, which, at common-law, were fee-simple conditional, into estates-tail (b).

HE SAID, that if a copyholder by licence make a lease for years, the surrenderee (lessee) of that copyhold is within the statute 32. *Hen.* 8. c. 37. to bring debt as assignee,

The surrenderee of a copyhold is an assignee within 32. *Hen.* 8. c. 37.

(a) Co. Lit. 60. b. — See also 1. Sid. 314. 3. Co. 8. Moor, 128. Carter, 22. 3. Com. Dig. "Copyhold" (C. 8).

(b) See the case of Rowden v. Malster, Cro. Car. 42. 45. S. C. Godb. 367. Hill v. Morfe, Moor, 188. Gravenor v.

Rake, Cro. Eliz. 307. 373. Dell v. Higden, Moor, 538. Sutton v. Stone, 2. Atk. 101. And see 6. Viner Abr. "Copyhold," page 198. pl. 11. where this controverted point is examined, and also the cases upon the subject collected.

HILARY TERM,

The Seventh of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* The Queen *against* Lord Drummond.

* [200]

Case 258.

LORD DRUMMOND stood bound by recognizance to appear here the first day of this Term.

A recognizance to appear cannot be discharged unless performed; but it may be respited.

SIR SIMON HARCOURT excusing his non-appearance by reason of sickness, moved, that his recognizance might be discharged,

THE ATTORNEY GENERAL having orders, and being in court, consented thereto.

But HOLT, *Chief Justice*, said, notwithstanding such consent, my Lord Drummond not appearing in person, the Court could not discharge the recognizance. But said, they could respite it until the next Term;

Which was done accordingly.

Sawyer against Loggin.

Case 259.

AN INFORMATION was for *striking* in the church, and an acquittal thereon; and then they exhibited articles in the spiritual court for *brawling* in the church.

If a defendant be acquitted in the temporal court on an information.

tion for *striking* in the church, and is proceeded against on the same cause of action in the spiritual court for *brawling* in the church, he may plead the former acquittal in bar, although they are distinct offences.

SAWYER
against
LOGGIN.

AND for the prohibition it was suggested, that where a man is acquitted at common-law, he ought not to be cited or sued in the spiritual court; and shewed, that an information was exhibited against him for the same battery, and that he was acquitted, &c.

• [201]

POWELL, *Justice*, said, that *brawling* and *striking* in the church are two distinct offences; and though they cannot proceed in the spiritual court for the *battery*, after an acquittal at common-law, yet they may go on for the *brawling*, for the common-law has not conformance of the *brawling* :

But for the cause aforesaid a prohibition was denied.

Sumner *against* Ferryman.

DEBT for sixty pounds on a bond dated the sixteenth day of August 1766. Upon oyer of the condition, it was set forth in hæc verba, viz. "The condition of this obligation is such, that if *Nicholas Hooper* do and shall appear before the mayor, aldermen, bailiffs, and under-steward of the borough of *New Windsor*, at the next court of record, to be holden at the *Guild-hall* of the said borough, on the nineteenth day of *August* instant, there to answer to *William Davies, Benjamin Child, and Benjamin Tompkins*, in a plea of trespass on the case, then this obligation to be void, or else in full force, &c."

and the servant, to release the barge and its cargo, give the bailiff a bond conditioned for his master's appearance at the next court, it is a legal bond, and cannot be avoided by a plea that the bailiff had no right to take it, or that it was taken by duress.

loaden

* loaden with several people's goods, from *Oxford* to *London*; and that in his voyage upon the *River of Thames*, near *New Windsor*, the bailiff of *New Windsor*, pretending to have process against *Nicholas Hooper*, and power and authority to attach the goods of *Hooper*, did attach the barge, then being *sub custodia et gubernatione* of the defendant, of which *Hooper* was master, and so hindered and detained them from going their voyage, and refused to let them go, unless the said *John*, the defendant, would give the said bond to the said bailiffs; so that the said defendant, to free the barge, and that he might deliver the goods to the owners, gave the said bond with the condition; *ubi revera* no bailiff ought to take such a bond; and that it was taken *extorsivè*, &c. *Et hoc paratus est verificare*, &c.

SUMNER
against
FERBYMAN.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

MR. PENGELLY for the plaintiff said, that this was a good bond, and shall not be avoided by *durefs*, for there is no assault or restraint to his person; and a bond shall never be avoided by *durefs*, but when the person is put in some terror, and so when his goods and chattels are taken illegally or irregularly; for if the case was so, he might avoid his bond. But here he shall not avoid this bond, because regularly taken; and cited 7. *Edw. 4. 22. Bro. Abr. "Durefs" pl. 16. 2. Inst. 483. Co. Litt. 253. b. Roll. Abr. "Durefs" 687.* and therefore the plea does not avoid the bond; and the condition not being against law, the plea is ill; and so prayed judgment for the plaintiff.

MR. RAYMOND for the defendant said, they had no authority to distrain this barge, and therefore the bond was void. There was indeed an action against *Hooper*, but it does not appear that this was his barge, only that he was master of it; also there were goods of other persons in the barge; and things for the benefit of trade shall not be distrained; like the common case of a horse in a smith's shop, &c. And as to what MR. PENGELLY said about *durefs*, he cited a case out of *The Book of Assizes (a)*, where a man made a deed by *durefs* done to him by taking his * cattle; and though there was not any *durefs* to his person, yet it was adjudged he should avoid the bond: then it may be objected, that though he may avoid a bond by *durefs* to his own goods, yet not to the goods of strangers, as these were; to which he answered, that the barge-man had a special property, &c. and for these reasons prayed judgment for the defendant.

* [203]

And at another day in this Term THE COURT gave judgment for the plaintiff; which was delivered by

HOLT, Chief Justice, who said, that the defendant having submitted to the process, let it be right or wrong, the bond which he

(a) Book of Assizes, 29. pl. 14. which case is abridged in 1. Roll. Abr. "Durefs," 687.

gives

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gives shall be a good *bail-bond*, and shall not be avoided. If the goods of a stranger are in my custody, and are attached, if I do not contest it, but give a bail-bond, their being the goods of a stranger shall not avoid the bail-bond. Indeed if he had taken it *colore officii*, when there was no process at all, it had been void by the statute 23. Hen. 6. c. 10.

POWELL, *Justice*, said, a man cannot avoid his bond by dures to his goods, but only to his person. 2.

Judgment for the plaintiff.

Cafe 261.

Legg against Stradwick.

A lease from Lady-day for the term of one year, *et sic de anno in annum quamdiu ambobus partibus placuerit*, is, after the first year, a lease from year to year, until the lessor or lessee determine it.

S. C. Salk. 414.
S. C. Holt, 417.
6. Co. 35.
2. Roll. Abr. 851.
3. Bac. Abr. 432.

* [204]

THE EARL OF BEDFORD, the second day of January 1692, demised to Anne Horsenell from Lady-day 1695, for twenty-one years; which term by mean assignments came to Stradwick the defendant; and he, on the twenty-fifth of March 1703, demised to Jacob Broom, from the twenty-fifth of March unto the full end and term of one year, and so *de anno in annum quamdiu ambobus partibus placuerit*, rendering forty pounds rent *per annum*.

Jacob enjoyed the term from the twenty-first of March to the seventeenth of December, and then died intestate; and administration was granted to Legg, the plaintiff, who entered into the said land; and because sixty pounds for a year and a half's rent was due, he avowed taking the cattle, &c.

The plaintiff, in bar to the avowry, said, he did not demise to Broom as he has alledged in the avowry; and on that issue is joined, and verdict for the defendant. And last Term,

* MR. WHITACRE moved in arrest of judgment, because it was but a lease for one year to Broom; then Stradwick's distraining for one year and a half's rent was ill, because he distrained after the lease was ended.

But this Term THE COURT gave judgment for the avowant, that the distress was lawful;

For HOLT, *Chief Justice*, said, such a lease as this is not a lease for two years, or a lease at will, but it is a lease for every particular year, and yet you may distrain for ten years rent, at the end of ten years; because one lease springs so out of the other, and out of the same contract, as that when one year is ended, there is an end of that lease, and when the lessee enters on another year, it is another lease for a year, *et sic toties quoties (a)*.

(a) See Potkin's Case, 1. Roll. 851. Bishop of Bath's Case, 6. Co. 36. Anonymous, Dyer, 24. a. Agard v. King, Cro. Eliz. 775. Gostwick v. Mason, 1. Mod. 3. Stomfield v. Hicks, 1. Salk.

413. Legg v. Strudwick, 1. Salk. 413. Panton v. Itham, 3. Lev. 359. Ferguson v. Cornish, 2. Burr. 1032. Shore v. Porter, 3. Term Rep. 13. Hall v. Richardson, 3. Term Rep. 462.

The

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The Parish of St. Giles's in the Fields *against* The Parish of Weybridge in the County of Surrey. Case 262.

SIMONS, a taylor by trade, an inhabitant of *St. Giles's* parish, removes to *Weybridge* in *Surrey*, with A CERTIFICATE, and there takes an apprentice, who served out his time, set up his trade, and lived two years in *Weybridge*. But his old master being become chargeable, the justices of the peace made an order to remove *Simons*, and his said apprentice, as part of his family, to the parish of *St. Giles*.

A. removed by certificate from B. to C. takes an apprentice, who serves out his time at C. and lives two years, cannot be removed with his master.

The order was moved to be quashed, because the word "family" must not be taken in so large an extent.

S. C. Fort. 315.

And this Term the Court gave their resolution that the order was ill.

HOLT, *Chief Justice*, said, the question was, Whether this apprentice ought to be removed with his master, by the word "family" in the statute 8. & 9. *Will. 3. c. 30.* ? The act says, "that if any person or persons shall come into any parish to reside, and shall bring a certificate from any other parish, thereby owning and acknowledging the person or persons mentioned in the said certificate as inhabitants legally settled in the parish from whence such certificate shall come, he or they shall oblige the said parish to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants of that parish, whenever he, she, or they shall happen to become chargeable to the parish to which such certificate was given; and then, and not before, it shall and may be lawful for any such person, and his or her children, though born in that parish, not having otherwise acquired a legal settlement there, to be removed and settled in the parish or place from whence such certificate was brought." Now this apprentice never came with a certificate; besides, the statute says, "any such person," that is the person mentioned in the certificate, "and his or her children, though born in that parish;" that is, they that came along with him shall go back, and no other than them and the children born after; and for * them there is a special provision in the act. SECONDLY, He inhabited two years after the apprenticeship, which is another settlement. Therefore he is well settled at *Weybridge*, and cannot be removed to *St. Giles's*.

* [205]

Whereto POWELL, *Justice*, accorded.

POWYS, *Justice*, said, it was like the case of *St. Bride's v. The Savoy*, where a lodger in the *Savoy* came into *St. Bride's* parish, and rented a shop in *Fleet-street*, but gained no settlement there; but took a servant or apprentice, who served his time with the lodger; this was adjudged a good settlement for the servant or apprentice, though the lodger or master himself had never gained one: because

Hilary Term, 7. Queen Anne, In B. R.

THE PARISH
OF
ST. GILES IN
THE FIELDS
against
THE PARISH
OF
WYDERIDGE,
SURREY.

because the service being performed in the parish of *St. Bride's*, it gained the servant a legal settlement; and the notice to be given according to the statute does not extend to a servant or an apprentice.

GOULD, *Justice*, said, seeing that he had lived two years in *Wyderidge* after he was out of his time, he could not be removed; but if the master had been removed during his apprenticeship, it had been another case (*a*).

(*a*) By 12. *Ann. c. 18. s. 2.* "If any person whatsoever shall be an apprentice, bound by indenture to any certified person, and not afterwards having gained a legal settlement in the parish, such apprentice, by virtue of such apprenticeship, shall not gain or be adjudged to have any settlement in such parish by reason of such apprenticeship, but every such apprentice shall have his settlement in such parish

"as if he had not been bound apprentice to such person as aforesaid." And see *Ivinghoe v. Stonebridge*, 1. *Stra.* 265. *Rex v. Clithydon*, Burr. S. C. 161. *Rex v. Sellar*, 1. *Wils.* 184. *Rex v. Bishopswill*, Burr. S. C. 381. *Rex v. Spotland*, Burr. S. C. 527. *Rex v. Weddington*, Burr. S. C. 766. *Rex v. St. Peter's*, 1. *Term Rep.* 218. *Rex v. Hinckley*, 4. *Term Rep.* 371.

Case 263. The Parish of *St. Alban's* *against* The Parish of *St. Botolph's* *Bishops-Gate*.

Order to remove a man where he was bound apprentice, and served as long as his master lived, ill.

AN ORDER OF TWO JUSTICES was made to remove a poor man from *St. Alban's* to the parish of *St. Botolph*.

The order says, "that upon complaint being made to them, &c. upon examination it appears, he is likely to become chargeable; and it appearing that he was bound apprentice in the parish of *St. Botolph Bishops-Gate*, and that he there served as long as his master lived, therefore they adjudge that to be the place of his last legal settlement, &c."

SIR EDWARD NORTHEY moved to quash this order, for it is altogether uncertain. For FIRST, It does not appear that he was bound by *indenture*, and if he was not, he does not gain a settlement (*a*).

* [206]

SECONDLY, It does not appear how long he * served, only that he served as long as his master lived, which might not be above a week; therefore it is uncertain.

MR. RAYMOND for maintaining the order said, it is a question if the bare binding of itself does not make a settlement, and the forty days mentioned in the statute is only as to the residence.

(*a*) But by 31. *Geo. 2. c. 11.* "No person, who shall be bound apprentice by any deed, writing or contract not indented, being first legally stamped, shall be liable to be removed from the place in which he is so bound and

"been resident forty days, by reason of such deed, writing, or contract not being indented only."—See vol. 1. of Mr. Const's Poor Laws, page 471 to 502.

* SECONDLY,

Hilary Term, 7. Queen Anne, In B. R.

SECONDLY, The justices do adjudge *St. Botolph Bishops-Gate* to be the place of last legal settlement, which is enough for them to remove him.

THE PARISH
OF
ST. ALBANS
against
THE PARISH
OF
ST. BOTOLPH'S
BISHOPS-GATE.

But THE COURT concluded the place of his last legal settlement from the premises which are ill; and says, "therefore we do adjudge, &c." and for these reasons before given by SIR E. NORTHEY, they quashed the order for uncertainty. And

HOLT, *Chief Justice*, said, that notice is to be given when a man comes into a parish, but no notice is necessary in case of an apprentice or servant (a); and barely binding a man apprentice, does not gain a settlement, unless he serves forty days.

And then he took exceptions, that by the act of parliament, when an order is made by corporation justices, the appeal must be at the next quarter sessions: but upon reading the statute it appeared, that the borough of *St. Alban* was excepted out of the act.

Order quashed.

(a) And now by 35. Geo. 3. c. 101. no person shall gain a settlement by delivery and publication of notice.

The Queen against The Commissioners of the Land-Tax for Barnwell. Case 264.

UPON the motion of SIR PETER KING, *Recorder of London*, *Mandamus* totax THE COURT granted a *mandamus* to the commissioners of lands equally. the land-tax for *Barnwell*, to tax the lands there equally.

S. C. Park, 74.
Ante, 89.

Fowbert against Ekins.

Case 265.

SIR J. MOUNTAGUE, *Attorney General*, moved for a new trial in this cause, because THE POSTEA was eaten with rats.

It is no ground for a new trial that the *postea* is partly destroyed.

But THE COURT denied it; for there was * part of it remained, and particularly the costs and damages, written with the party's own hand.

* [207]

The Queen against Griffith.

Case 266.

MR. DEE moved to quash an indictment against the defendant for taking goods *feloniously*, which the prosecutor had as executrix to J. S. Indictment of felony quashed.

CURIA. It is not said where he took them, nor in what manner, so that it does not appear he stole them.

Quashed *nisi*.

Hull

Hilary Term, 7. Queen Anne, In B. R.

Case 267.

Hull *against* Holliday.

Statute of bankrupts pleaded, *ill*.

AN ACTION brought against a bankrupt. The defendant pleads the statute of Bankrupts, in which it is said, "that the person who does as the act directs may plead the general issue (a); and that he *manifestly* became a bankrupt before the day, &c.

HOLT, *Chief Justice*, said, this plea will not do; for when a statute gives a plea, it must be pleaded in *the words of the statute*; and besides, by this pleading it does not appear the person was within the act; for the debt might be after he became a bankrupt, and before he became a public (published) bankrupt, and then he would be out of the privilege of the act.

Therefore judgment for the plaintiff, *nisi* cause shewn before the end of the Term.

(a) See 5. Geo. 2. ca 30. s. 7.

Case 268.

Grumble *against* Jones.

Devise in remainder to A. and his heirs, &c. and for default over, is a fee.

ASPECIAL VERDICT finds, that the grandfather was seised in fee, and by will devises thus: "I give to my daughter Agnes for life, remainder to A. L. and his heirs; and for default of such heirs, remainders over."

* [208]

THE QUESTION was, If this be an estate in fee or in tail?

S. C. 2. Eq. Abr.

300.

S. C. 1. Salk.

233.

Lutw. 764.

2. Vent. 265.

3. Mod. 223.

4. Mod. 90.

9. Mod. 92.

3. Atk. 486.

HOLT, *Chief Justice*. You will find it a hard point to make this an * estate-tail.

SIR PETER KING urged, that it was so; and cited the case of *Idle v. Cook*, *Easter Term*, in the fourth of *Queen Anne* (a). If the remainder had been to his brother, or to anybody that had been heir at law, it would have been a tail; for then he could not have died without an heir, and so a remainder might properly be; or if it had been "*desce exeunte*," or the like: but these limitations were never carried further.

THE COURT gave judgment, that this was a fee, but made the rule *nisi*, &c.

NOTE, The controversy was between the heir of the devisor, and the heir of the devisee no way related to the devisor.

(a) Ante, 57.

Case 269.

Reeves *against* Gower.

In the Common Pleas.

Devise to A. I will pay a sum to B. within two years, A. has a fee.

IN A SPECIAL VERDICT the case was found thus: A. by his will devises lands to B. and then bequeaths legacies; and after two or three legacies to different persons, he gives five pounds to

fee.—S. C. 2. Eq. Abr. 300. 1. Roll. Abr. 834. 6. Co. 16. Cro. Eliz. 204. Cro. Jac. 597. 2. Vern. 106. 2. Mod. 25. Pollexf. 399. 2. Lev. 249. 2. Bl. Rep. 1215. 4. Burr. 2165. 3. Com. Dig. "Devise" (N. 4.). 1. Term Rep. 411. 2. Bl. Rep. 1045. Cowp. 235. 2. Bac. Abr. 54. C. and

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C. and directs B. to pay it, but gives him two years time to pay it. The jury find the lands to be fifty shillings a-year.

REEVES
against
GOWER.

THE QUESTION was, What estate B. had, whether for life or in fee?

AND ADJUDGED to be a fee; for that the devise here was a sum in gross, and a *debitum in presenti solvendum in futuro*; and it was a sum certain to be paid by B. at all adventures, whether the land yielded full five pounds or not; and so not like the cases where the sum devised is to arise out of the profits, &c. (a).

(a) See Collier's Case, 8. Co. 18. Green's Case, Hob. 65. the case of Reed v. Hatton, 2. Mod. 25. Lee v. Stephens, 2. Shower, 49. Baddeley v. Leppingwell, 3. Burr. 1533. Frogmorton v.

Halliday, 3. Burr. 1618. Doe v. Richards, 3. Term Rep. 356. Doe v. Woodhouse, 4. Term Rep. 92. Goodright v. Stocker, 5. Term Rep. 13.

Clerk against Price.

Case 270.

THIS CASE was now again moved, and agreed, that the words, if true, would subject him to ecclesiastical censure.

Words reflecting on a parson are not cognizable in the spiritual court, unless the imputation, if true, would subject him to ecclesiastical censure. S. C. ante, 140.

SIR PETER KING thereupon prayed a Consultation, and cited 3. Lev. 71. 18. Godb. 446. and 2. Roll. 297.

MR. SOLICITOR GENERAL argued, that defamation, to give the spiritual court jurisdiction, must be in respect of the cause, not of the person; and therefore there is * no difference between a clergyman and a layman, 4. Co. 20. 2. Inst. 692. And unless it subject him to ecclesiastical censure, though he be a clergyman, yet they have no jurisdiction for such defamation. Godb. 446. Nor can he have prejudice by the words; for when a parson is admitted by the ordinary, can he afterwards be deprived for ignorance? He might be refused for ignorance, but I never heard of one parson deprived for it. This parson was only a curate, &c.

* [209]

POWELL, Justice. But this is his way of living, i. e. his trade; and to say one is ignorant in his trade is actionable; so to say such an attorney, &c. is ignorant in his profession.

POWYS, Justice. Take all the words together they import a great scandal.

HOLT, Chief Justice. You must make something out for which he is suable in the spiritual court.

Et adjournatur (a).

(a) See cases noted to S. C. ante, 141.

Anonymous.

Hilary Term, 7. Queen Anne; In B. R.

Case 271.

Anonymous.

NOTE. Towards the conclusion of this Term, Holt, Chief Justice, declared for law, that no action of trespass *vi et armis* would lie for a tenant at will against his landlord, for the lord's entering or distraining for rent, &c. and cited Dyer, 119. 10. Edw. 4. 7. 2. Inst. 105. and Moor, 105. (a).

(a) AND NOTE, Finch's Law, li. 3. c. 6. that no action of trespass will lie for a lessee for years against the lessor, although he distrain without cause. And see there the reason. 2. 9. Co. 76. Yelv. 148.

Wing's Max. 1. 703.—NOTE to the former edition.—But see 2. Will. & Mary, sess. 1. c. 5. Stra. 717. 1. H. Bl. Rep. 13.

EASTER

E A S T E R T E R M,

The Eighth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Edward Northey, Knt. Attorney General.

Sir Simon Harcourt, Knt. Solicitor General.

* [210]

* Lord Altham *against* Lord Anglesea.

Case 272.

THIS was an issue directed out of chancery, to try the validity of *James* late *Earl of Anglesea's* will.

The case was this :

JAMES Lord Anglesea, tenant in tail of lands in *Ireland*, levied a fine, and the next Term following suffered a common recovery, wherein the conusee was made tenant to *the præcipe*, and the tenant in tail came in as vouchee.

It was found, that there was no deed or other writing, between the levying of the fine and suffering the recovery, to lead the uses of the fine ; but the tenant in tail, supposing himself seised in fee by the recovery, devised the lands in question to the plaintiff.

There were two points argued, which were saved upon the trial.

FIRST, As to the matter of evidence ; Whether depositions taken in *Ireland* by virtue of a *dedimus*, certifying that the papers good.—AND NOTE, Depositions taken in *Ireland* may be read on a trial in *England* to prove the record.—S. C. Gilb. Rep. 16. S. C. Salk. 676. S. C. Holt, 733.

If a tenant in tail, with remainder in tail, levy a fine *sur conuſance*, &c. to *A. B.* and his heirs in order to make him tenant to *the præcipe*, without declaring the uses of the fine, the freehold vests in *A. B.* and therefore if a writ of entry be brought against him, and he vouches *the cognitor* of the fine, the common recovery thus suffered is

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LORD ALTHAM
against
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ANGLESEA.

sent over were true copies of certain fines and recoveries suffered there, and witnesses swearing that they were the same, and had received no alteration, &c. be good evidence?

SECONDLY, Whether, there being no deed to lead the uses, according to the statute of Frauds and Perjuries, the use resulted to the conusor, or went to the conusee, so as to make a good tenant to the *præcipe*?

* [211]

SIR SIMON HARCOURT and SIR THOMAS POWYS, for the defendant, argued, that the evidence was not good; because the best evidence that can be had must be given; and here * they might have sent one to have examined these records, who might have taken copies of them, and have attested them to be true copies *vi-vâ voce*.—And as to THE OTHER POINT they argued, that the uses not being declared in writing, the fine could not make a tenant to the *præcipe*, and so the recovery was void; for they said, a fine without uses declared in writing, would have no effect, but it would result to the conusor in the same condition it was in before the fine levied, and so not cut off the intail.

SERGEANT HOOPER, THE SOLICITOR GENERAL, and MR. EYRE, for the plaintiff argued, that the depositions were good evidence; for depositions of one that is sick or cannot come may be read; and all those, through whose hands these passed, swore they were not altered.—As to THE SECOND POINT they said, that the intent was plain, viz. only to make a tenant to the *præcipe*, in order to suffer a common recovery to cut off the intail, to the end that JAMES Lord Anglesea might dispose of his estate by will; that it was a question, whether uses were included in the statute of Frauds by the words “trusts and confidences;” that the notion that a use shall result to the conusor, if it is not declared otherwise in writing, is grounded on 1. *Inst.* 23. b.; but that it appears by the cases of *Shortridge v. Lampew* (a) and *Reynolds v. Blake* (b), that if a fine be levied, it shall not be esteemed of no effect, but shall go to the conusee, if nothing appear to the contrary; that a fine is like a feoffment, and is a feoffment of record; and if a feoffment be made to B. of *Black-Acre* (for a thousand pounds), it will go to B. and not result; that presumptions are to be made for the benefit of common recoveries, being now become common assurances.

Upon arguing this case,

* [212]

HOLT, Chief Justice, said, that if a tenant in tail discontinue in fee, and a *præcipe* be brought against one who is not tenant to the *præcipe*, and the tenant in tail come in as vouchee, whereby he admits the stranger to be tenant to the *præcipe*, this shall estop the tenant in tail, and his heirs general, but not the issue in tail; yet trusts and uses are synonymous in the law, &c. Suppose a bargain and sale is made to suffer a common * recovery within a year, and

(a) Mich. Term, 1. Ann. 2. Salk. 678. 7. Mod 71. 3. Salk. 386. Holt,
(b) 9. Will. 3. 3. Salk. 25. 40.
621. 2. Ld. Raym. 798.

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none is suffered, it is to the use of the bargainor. But in this case, where *the præcipe* is brought against the conusee, there is a use arises to him by operation of law.

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against
LORD
ANGLESEA.

POWELL, *Justice*, said, he was not so clear as THE LORD CHIEF JUSTICE; but said, that a penny consideration would prevent the resulting of the use, but here was none: upon levying the fine there was a use, and where did it vest but in the conusor, and how came it out of him?

The last day of this Term THE COURT gave their opinion *seriatim*.

GOULD, *Justice*. There are two points in question:

Evidence.

FIRST, Whether the depositions of one who is out of *England*, where no process will fetch him, may be read as evidence to prove the record? And I hold it may; as also in case one be sick, &c. (a).

SECONDLY, As to the tenant to *the præcipe*; I hold, that here is a good tenant to *the præcipe*; for I do not take it to be within the statute. If there be a common recovery suffered, it must be presumed that there is a tenant to *the præcipe*; and if there be none, it must be avoided by a writ of error.

POWYS, *Justice*, of the same opinion, as to THE FIRST POINT, for the same reason.

SECONDLY, I hold, that if a fine be levied to *A.* with consideration at this day by a parol averment of the money being paid, it will vest the use in the conusee, and so I hold it would be, though within the statute; it was certainly so before the statute, and is so at this day. Besides, they being but one conveyance, you cannot raise a construction of law in the middle of a conveyance. Upon the reason of *Dowman's Case* (b), the deed may follow a long time after the fine; and in *Dyer* it follows four years after; and so it may be longer, if there be no act done in the mean time declaring the intent to be otherwise.

Note.

POWELL, *Justice*. As to THE FIRST, I would have it brought to a certainty; it is better to have witnesses *viva voce*, where * they may be had. But suppose the record be out of the queen's dominions, or in the *West Indies*, or in *Scotland*, I take it that a deposition would do in such cases, &c.

* [213]

As to THE SECOND POINT, as it is dangerous to avoid such conveyances, so it is to break into the statute. Though the recovery shews the intent, yet it is not such a writing as is intended by the statute; and the common law will not distinguish between trusts and uses. Neither the conusee nor a stranger can take a

(a) Fry v. Wood, 1. Atk. 445. Ben-son v. Oline, 2. Stra. 920. Baker v. Lord Fairfax, 1. Stra. 101. Rex v. Tilley, 1. Salk. 236. 2. Ld. Ray. 1008. Holcroft v. Smith, 1. Eq. Abr. 224. Coffe v. Tracey, 1. Peer. Wms. 287. Hawes v. Hand, 2. Atk. 615. (b) 9. Co. 8.

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against
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use by a parol averment. But here I hold that the conusee did not take by way of use, but at common law: but here there must be a parol averment to prevent the resulting of the use. But such averment will not be admitted. The fine had its operation immediately before the recovery, so as here must be a parol averment that it was to the use of the common recovery; and this parol averment, hindering the resulting of the use, is out of the statute; for it is not to raise a use, but to prevent its resulting.

HOLT, *Chief Justice*, said, as to THE FIRST POINT the law requires the best evidence that can be had. But we cannot compel any one to come out of *Ireland*; nor oblige any one to go and inform himself, in order to be a witness: but this rule is to be interpreted with respect to the person deposing; as that a man's affidavit shall not be read when he is here to give his evidence *vivâ voce*; but when the person cannot be brought into court; though there be other witnesses to give evidence *vivâ voce*, yet the depositions of those that are absent may be read: he cited 2. *Gro.* 541. but said, he would not warrant the authority of the case.

TO THE SECOND POINT he said, that this was out of the statute of Frauds and Perjuries. There are two clauses in the statute. The first is, "That all declarations of trusts shall be manifested by some writing, signed by the party, or by his last will in writing, or else be void;" the second is, "That trusts resulting by implication of law, shall be as if this act had not been made." Now I hold, that since the statute there must be a parol averment to make the use result; *for at common law, if a fine was levied, it was to the use of the conusee until such averment. When tenant in tail comes in as vouchee, he admits the conusee tenant to the *præcipe*; and his meaning is plain, that he intended to make himself tenant in fee; not from the use that should result from the conusee, but from that resulting from the seisin of the recoveror (a).

Ideo nemine contradicente, judgment for the plaintiff.

The 29. Car. 2.
c. 3. f. 7. extends only to
strangers, and not
to parties to the
fine.

2. Vern. 294.
1. Peer. Wms.
112.
Dougl. 26.

NOTA, In this case HOLT, *Chief Justice*, also said, that the statute of Frauds, which enacts, "that the declaration of trusts shall be manifested by some writing signed by the party," extends only to the strangers, and not to the conusee of the fine; for there need be no writing to declare the use to him, therefore it cannot result without a parol averment (b): but when a fine is levied, and it is to the use of a stranger, then it is within the statute, and must be declared in writing.

(a) *Thrustout v. Peake*, 1. Str. 17.
and see *Roe, lessee of Roach widow, v.*
Popham and Others, Dougl. 25. where
LORD MANSFIELD is reported to have

said, that the principal case of *Altham v.*
Anglesea is good law.

(b) *Callard v. Callard*, 2. Roll. Abz.
788.

The

Easter Term, 8. Queen Anne, In B. R.

The Queen *against* Vicars.

Case 273.

A MANDAMUS to the corporation of *Doncaster* to restore *A* capital bur-
Vicars to be a capital burghs.

burghs cannot be
disfranchised for
preventing the
corporation from
receiving a toll,
pretended to be
due to it by
prescription.

To which they return, that the corporation have time out of
mind had a toll for coals, viz. for every wain-load going through
the town a coal of the value of one penny; for every cart-load a
coal to the value of a halfpenny; and for every horse-load a coal as
big as a piece of wood (kept time out of mind by the corporation):
that the said *Vicars* did, contrary to his oath, hinder the gathering
of this toll, as well by menaces to the toll-takers, as by persuading
the owners of the coals not to pay the toll, and telling them, that
he would uphold them in their refusal.

11. Co. 99.
Stiles, 151.
Carth. 174.
Ray. 438. 446.
Cro. Jac. 506.
1. Sid. 282.

After several arguments,

THE COURT was of opinion, that it was not sufficient cause to
turn him out.

For POWELL, *Justice*, said, it was no more than saying the toll
was unreasonable, when it appears so to be to the Court, and also
uncertain.

Therefore a *peremptory mandamus* was granted.

* [215]

* The Queen *against* Jennings.

Case 274.

INDICTMENT for refusing to take upon him the office of
high-constable for the hundred of *Farnham*, *licet debito et legali*
modo electus fuit, &c.

An inhabitant of
a particular leet is
not thereby ex-
empt from serv-
ing the office of
HIGH CONSTA-
BLE of the hun-
dred.
S. C. post. 227.

The defendant pleaded *not guilty*. The jury found a special
verdict, that the defendant *Jennings* was, at a court holden for the
manor of the hundred of *Farnham*, on the sixteenth day of *Septem-*
ber, in the sixth year of *Queen Anne*, *debito modo electus* chief con-
stable for the hundred of *Farnham*; and that he being so elected,
did refuse, &c. THEY FIND FARTHER, that within the manor
of the said hundred of *Farnham* there are several other manors
belonging to divers lords, the inhabitants whereof used to be
elected for the said hundred. THEY FIND ALSO, that there is the
manor of the town of *Farnham*, within the manor of the said hun-
dred, in which there is a COURT-LEET; and that the defendant
is an inhabitant within the said town of *Farnham*, *et non alibi*;
and that no inhabitant of the town of *Farnham* ever served as high-
constable for the hundred of *Farnham*.

THE QUESTION arising upon the special verdict was, Whether
the defendant being in a *particular leet*, is excused from serving as
high-constable of the hundred?

And on debate, THE COURT held, that he is not excused.

Easter Term, 8. Queen Anne, In B. R.

THE QUEEN
against
JENNINGS.

HOLT, *Chief Justice*, said, that HIGH-CONSTABLES are officers at common law; and that the statute of 13. *Edw. 1. c. 6.* did not give them an additional authority; and that if a hundred have not a *leet*, the high-constable must be chosen at the *sheriff's tourn*, yet his power would be restrained to the particular hundred; and I do not know that the *statute of Winchester (a)* makes such an alteration as will exempt him. He said likewise, that in a private leet the lord may sit as judge, and exclude the steward.

Quare, if so in a public leet.

THE COURT gave judgment for the queen, upon the special verdict (*b*).

But exceptions being taken to the indictment, it was put off to *Trinity Term* next (*c*).

(a) Chap. 6.

(b) See 3. Hawk. P. C. ch. 11. f. 3.
Rex v. King, 3. Keb. 230. S. C. Freem.
348. Rex v. Bettsworth, 2. Show. 75.
Rex v. Genge, Cowper, 13. that one
who is resiant within a private leet within

the hundred, is not therefore exempt from serving the office of constable of the hundred; and that a *custom* to elect such a resiant is good.

(c) See S. C. post. 227.

* [216]

Case 275.

* Smith against Bowen.

THE defendant *Bowen* was indicted at THE OLD BAILEY for the murder of one *Smith*, and found guilty, but obtained the queen's pardon. The appellant, an infant, as brother and heir to the deceased, lodged an appeal in *propria persona* against the said *Bowen*, before the justices of *oyer and terminer* and gaol-delivery, the same sessions at THE OLD BAILEY; which being removed by *certiorari* into the court of king's bench,

S. C. post. 230.

254.

SIR THOMAS PARKER for the appellant moved, that he might be admitted *per guardianum* in the king's bench.

S. C. 2. Ld.

Ray. 1288.

S. C. Ray. Ent.

536.

THE COURT refused it as too late, for it ought to have been commenced by *guardian* at first, and then they should have moved to have had him admitted by his guardian in the king's bench.

A *nonsuit* in an appeal is *peremptory*.

THE COURT said, that if the defendant pleaded this in *abatement*, the appellant might confess his plea, and commence a new appeal by bill; for a *nonsuit* is *peremptory*; but an *abatement* is not.

AFTERWARDS the appellee being brought to the bar, and the appellant being in court, his Counsel would have abated the writ, and brought a new appeal by bill;

But THE COURT would not let them.

will not plead the infancy in *abatement*, the Court, on inspection of the appellant, may abate the writ *ex officio*.

HOLT,

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HOLT, *Chief Justice*, said, that this is not like the case of *Watts v. Brains* (a), for there the writ was void.

SMITH
against
BOWEN.

AT ANOTHER DAY, the appellee being brought to the bar, the appellee's Counsel refusing to plead the infancy in abatement, desigining to take advantage of it after trial;

THE COURT said, that since they would not plead the infancy in abatement, the Court would abate the first appeal *ex officio*.

And THE COURT ORDERED it to be entered, that the said appellant being in court, and it appearing, by inspection of the appellant, that he was under age, therefore the Court *ex officio* does abate the appeal.

And HOLT, *Chief Justice*, said, that if the appellant had not been in court, then there must have been a writ to have brought him into court, to inspect him.

* [217]

Hereupon the appellant brought another appeal by bill, and declared against him * *in custodia mareschalli* (b); and the appellee being arraigned *instante*, demurred to the appeal, and pleaded *not guilty* (c).

On an appeal being abated, and a new declaration in *custodia mareschalli* delivered, if the appellee demur to the declaration, the abatement shall be first entered.

THE COURT ordered the abatement of the first appeal to be entered as the first day of the Term; and that the pleading to the second should be entered *instante*, that the demurrer might be first determined; and for that end made it a *consilium* to be argued in Trinity Term next (d).

The appellee prayed to be admitted to bail;

Which THE COURT said, they could do on issue joined, demurrer, or *Curia advisare vult*, if he could find four sufficient bail, who would be bound *body for body*.

An appellee may be bailed by four persons, *body for body*.

But those he offered not being approved of, he was remanded to THE MARSHALSEA.

(a) 3. Co. Ent.

(c) See post. 254.

(b) See 3. Hawk. P. C. 7th edit. ch. 23. sect. 4.

(d) See the Causes of Demurrer stated and argued post. 250.

Young against Slaughterford.

Case 276.

SLAUGHTERFORD was indicted at *Kingston assizes* for the murder of *Jane Young*; and the jury there acquitting him against evidence, HOLT, *Chief Justice*, who tried him, remanded him, and ordered AN APPEAL to be brought against him.

Appeal of murder after acquittal, directed by HOLT. 2. si just? Post. 228.

The appellee being brought up by *habeas corpus*, and committed to THE MARSHALSEA, an appeal was accordingly brought; and being brought to the bar, and arraigned in *French*, he pleaded in

which he was stated to be commorant is misnamed, need not be verified by affidavit pursuant to 4 & 5. Ann. c. 16.

On an appeal of death, a plea in abatement that the place at

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YOUNG
against
SLAUGHTER-
FORD.

abatement, that the vill in which he was commorant was *Shauford*, ABSQUE HOC that it was *Shalford* (a).

MR. RAYMOND for the appellant said, that the appellee's plea was not to be received without an *affidavit*; since the statute 4. & 5. Ann. c. 16. for amendment of the law, it being a *dilatory plea*.

THE COURT at first inclined that the plea could not be received without an *affidavit*, criminal causes not being excepted out of the act. But the appellee being brought the next day,

THE COURT was of opinion, that the plea might be read without an *affidavit*, because though this plea for the most part is dilatory, yet it is not in this case, for the appellee must plead over, and * issue joined on that as well as upon "not guilty," and both may be tried at the same time (b).

And accordingly the plea was received, and read in *French* by his Counsel.

In what manner
a plea of *misno-*
mer, on an ap-
peal of death,
shall be tried.

The appellant's Counsel *instantly* joined issue in *French*, to which the appellee's Counsel said "*semblement*."

THE COURT ordered, that a *venire* should be issued out, bearing *teste* the first day of Term, and the appellee should be tried at THE BAR; upon which the appellee was remanded to the custody of THE MARSHAL, because none would be bound *body for body* for him.

THE COURT said, there must be four bail in an appeal of murder.

HOLT, Chief Justice, ordered, that his irons should be taken off when he was brought into court.

(a) See this point argued, post. 229.
(b) By 4. Ann. c. 16. s. 7. it is provided, that nothing in this act before contained shall extend to appeals or indictments; but by a subsequent clause, s. 11. it is enacted, "that no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true." And it has been determined that a plea

in abatement for a misnomer of the place of residence in an indictment must be verified; for that the seventh section of the statute does not extend to the eleventh, Rex v. Grainger, 3. Burr. 1617. But it seems that a plea to the jurisdiction on an indictment *at bar*, need not be verified, Kinlock's Case, Foster, 16. S. C. 1. Will. 157. And a plea in abatement on an appeal, appears to have been admitted without affidavit in the case of Reeves v. Trundal, 1. Str. 402.

Case 277.

Sawyer against Mawgridge.

Debt on bond,
on a writing un-
der seal in these
words, "These
are to autho-

DEBT UPON A BOND. The defendant, according to the statute 4. & 5. Ann. c. 16. pleaded two pleas, viz. "*non est factum*," and "that the plaintiff had satisfied himself by sale." Issue thereupon, and verdict for the plaintiff.

"I give you to sell my goods to the amount of nine pounds, which I do hereby acknowledge I owe you," is good:—2. Roll. Abr. 146. 1. Leon. 25. 3. Leon. 119. 223. Cro. Eliz. 886. 3. Mod. 154. 3. Bac. Abr. 692. 5. Com. Dig. "Obligation" (B. 1.).

It

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IT WAS MOVED *in arrest of judgment*; and upon *oyer* of the bond or note, it was in these words, "THESE are to authorize you J. S. to sell so many of my goods as come to nine pounds, to pay my debts, which I do hereby acknowledge to owe to you, &c."

SAWYER
against
MAWGRIDOR,

THE COUNSEL for the plaintiff cited *Core's Case* (a), *Hatley's Case* (b), and the case of *Watson v. Snead* (c).

THE COUNSEL for the defendant cited an anonymous case in *Ventris* (d).

HOLT, *Chief Justice*, and POWELL, *Justice*, held, that the action lay for those words, for the word "oblige" is not necessary to make a bond; for if one under hand and seal acknowledge himself "indebted," it is enough to bind him.

POWYS, *Justice*, held, that the words "I do hereby acknowledge to, &c." were by way of parenthesis;

Which HOLT, *Chief Justice*, opposed.

Judgment for the plaintiff (e).

(a) Dyer, 20. a.

(b) Keilw. 34. b.

(c) 1. Vent. 238.

(d) 1. Vent. 42.

(e) See *Hardman v. Hardman*, Cro. Eliz. 886. *Morgan v. Johnston*, Cro. Eliz. 561.

* [219]

* Roberts against Morgan.

Case 278.

TRESPASS for going over the plaintiff's close with horses, cows, and sheep. The defendant justified, that he has a way for horses, cows, and sheep, and says, that such a day he went over with horses.

A justification must answer the whole trespass as laid in the declaration.

Upon demurrer IT WAS ADJUDGED ill; for it is a justification only for horses (a).

S. C. Holt, 568. Mcor, 281. Cro. Car. 102. 4. Bac. Abr. 394. 8. Mod. 330.

Judgment for the plaintiff. *Sed quære.*

(a) See *Carr v. Donne*, 2. Vent. 193. 51. *Hunt v. Braines*, 4. Mod. 402. *Johnston v. Adams*, 5. Mod. 78. S. C. *Morewood v. Wood*, 4. Term Rep. 157. 12. Mod. 84. *Eyre v. Glossop*, Carter,

Nelson against Collins.

Case 279.

A WRIT OF ERROR out of the common pleas. The error assigned was, that in the declaration it was "COLLINS per — BUSHBY, *attornatum suum*," without any christian name.

Error on a blank declaration, yet judgment affirmed.

HOLT, *Chief Justice*, said, that he remembered a case, where it was assigned for error, that the attorney by whom the party appeared, was no attorney of that court. But it was disallowed for error; and that is not the merits of the cause, and may be helped by the late act, it being after verdict.

1. Roll. Abr. 207. Barnes, 11. Ld. Ray. 771.

The judgment was affirmed.

Harrington

Cafe 280.

Harrington *against* Bush.

In trespass for taking cattle, A PLEA that the defendant was *possessed* of the place where and took them *damage feasant*, is good, without shewing further title.

ACTION OF TRESPASS for taking cattle. The defendant pleaded "*quod possessionatus fuit*" of the close; and that he took them *damage feasant*.

The question was, Whether in this case *possessionatus fuit* was sufficient? or, Whether the defendant should have set forth his title?

For the plaintiff was cited the case of *Pell v. Garlick* (a).

* [220]
S. C. Fort. 255.
S. C. Holt, 23.

* POWELL, *Justice*, said, that if the title cannot come in question, *possessionatus fuit* is sufficient. But perhaps in this case the title may come in question; and he cited the cases of *Feldar v. Ridge* (b), and *Puresfoy v. Grime* (c).

HOLT, *Chief Justice*, said, that he thought the title could not come in question; for the action is brought only for taking his cattle. If he had claimed the land, the action should have been for entering the land (d); but where the trespass is only for a personal act, as beating or taking cattle, *possessionatus* is sufficient (e). If A. be possessed, and B. come and tread down his corn, and A. *molliter manus imposuit*, to put B. out of his corn, for which B. brings assault and battery; A. may plead *quod possessionatus fuit*, &c. and that he *molliter manus imposuit* to put B. out of his corn, and it is good, without setting forth a title. He said, this was like the principal case, for the action is transitory, and cannot be made local but by a *clausum fregit*: Indeed in an avowry, a title must be shewn, but that is not like this case.

POWYS and GOULD, *Justices*, were of the same opinion.

And judgment was given for the defendant (f).

(a) 2. Lutw. 1492.

(b) Yelv. 74. Cro. Jac. 206.

(c) Cro. Jac. 291.

(d) Cro. Jac. 32. 1. Roll. Rep. 13.

(e) Searl v. Bunnian, 2. Mod. 70.

S. C. 1. Freem. 206. Langford v. Webber, 3. Mod. 132. Anonymous, 2. Salk. 643. in which last case it is said, the same point was adjudged in the case of Southby v. Eaton, in the king's bench, in Michaelmas Term 16. Geo. 2. on a writ of error. See also Aspindal v. Brown, 3. Term Rep. 265.

(f) That in a declaration it is sufficient as against a *wrong-doer*, to shew possession only, see Stroud v. Birt, 4. Mod. 418. S. C. 12. Mod. 97. S. C. Skin. 691.

S. C. Com. Rep. 7. Langford v. Webber, 3. Mod. 132. St. John v. Moody, 1. Vent. 275. Blockley v. Slater, 3. Lev. 266. Kenrick v. Taylor, 1. Wils. 326. Waring v. Griffiths, 1 Burr. 443. Rider v. Smith, 3. Term Rep. 766. But see the case of Grinstead v. Marlow, that although a plaintiff is allowed to declare generally upon his possession against a wrong-doer, yet in a PLEA it is necessary to set out a strict legal title, 4. Term Rep. 717. Rider v. Smith, 3. Term Rep. 768. See also Johns v. Whitley, 3. Wils. 65. Silly v. Dally, 1. Ld. Ray. 331. Godfrey v. Rock, cited, 4. Mod. 419.

Anonymous.

Cafe 281.

ACTION UPON THE CASE for words spoken of one who went about the country to collect charity for a loss by fire. The words were, "He fired his house" (INNUENDO voluntarily); "he was brought up to rook and cheat the country, and since he has fired his house he has cheated it more and more;" *per quod* he lost much charity, which otherwise he would have had. After trial, and verdict for the plaintiff,

An action for saying "he fired his house," (INNUENDO voluntarily) is bad; for an innuendo cannot enlarge the sense.

PAGE, *in arrest of judgment*, moved, that the action did not lie.

And THE COURT was of the same opinion; for the *innuendo* did not supply the place of *voluntarily* (a), which must be proved to make him criminal (b); and suppose it had been said "voluntarily," yet the action would not lie; * for it is not felony (c), unless it be with intent to fire his neighbour's house (d); and though the words are taken *in malam partem*, yet they are not actionable.

* [221]

Also POWELL, *Justice*, said, it was unlawful for people to go about the country and collect charity, unless they have letters patents (e).

And *per* HOLT, *Chief Justice*, to say a man is "an arrant knave, rogue, or rascal," is not actionable.

The judgment was arrested.

(a) That an *innuendo* can only explain the meaning of words, but cannot enlarge the sense of them, see 1. Roll. Abr. 82. 1. Brownl. 7. 3. Lev. 68. 166. Salk. 513. Cro. Car. 92.

(b) See 1. Hawk. P. C. ch. 39.

(c) See *Rex v. Sparling*, Cases Crown Law, 2d edit. 193. *Rex v. Breeme*,

Cases C. L. 195. *Pedley's Case*, Cases C. L. 269. S. C. Cald. 218. *Harris's Case*, Foster C. L. 113.

(d) See *Rex v. Holmes*, Cro. Car. 377. 1. Hale P. C. 568. 1. Hawk. P. C. 7th edit. ch. 39. f. 11.

(e) See 4. Ann. c. 14.

Kid against Dr. Watkinson.

Cafe 282.

AMANDAMUS was granted to restore a parish-clerk, he being elected by the parishioners, and displaced by the parson (a).

Mandamus for a parish-clerk. Post. 261. 1. Vent. 143. 153.

(a) *Reg. v. Wall*, post. 261. and the wardens of Kingscleer, 2. Lev. 18. cases there cited; and *Rex v. Church* Anonymous, March Rep. 101.

Tutty against Alewin.

Cafe 283.

ACTION ON THE CASE for words was brought by an apothecary. The words were, "It is a world of blood he has to answer for in this town, through his ignorance: he did kill a woman and two children at Southampton; he did kill John Prior at Petersfield." And in another place the defendant said,

To impute ignorance to an apothecary in the practice of his profession is actionable.

"he

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TUTTY
against
ALEWIN.

"he was the death of *John Prior*, he has killed his patient with
"physick;" *ubi revera* they died by the visitation of God.

ADJUDGED that the action lies (a).

(a) NOTE, The cases cited were Poe
v. Dr. Mondford, Cro. Eliz. 620. S. C.
1. Roll. Abr. 71. An Anonymous Case,
1. And. 268. Shuter v. Emmett, Godb.
341. 2. Roll. Rep. 343. Watfon v.
Vanderlash, Hetley, 69. Cawdrey v.
Highley, Cro. Car. 270. Peacock v.
Leach, T. Jones, 140.—See also Allan
v. Eaton, 1. Roll. Abr. 54. S. C.

1. Danv. Abr. 112. Goddard v. Hafel.
foot, 1. Roll. Abr. 54. S. C. 1. Danv.
Abr. 112. An Anonymous Case, Savill,
126. Wharton v. Brook, 1. Vent. 21.
S. C. 2. Keb. 489. Flower's Case, Cro.
Car. 211. Blunden v. Eustace, Cro.
Jac. 504. Stanton v. Smith, 2. Ld. Ray.
1480. S. C. Stra. 762. Peake v. Old-
ham, Cowp. 275.

Case 284.

* Anonymous.

A probate of a
will made by a
feme-covert can-
not be granted
without the hus-
band's consent.

BANISTER, *Serjeant*, moved for a prohibition to the spiritual
court, to prohibit them from proving a will made by a *feme-
covert*, without her husband's consent.

HOLT, *Chief Justice*, said a *feme-covert* cannot devise what she has
as executrix without the husband's consent.

And the motion was granted *nisi* this Term, and made absolute
in *Trinity Term* following (a).

(a) See Brook v. Sir William Turner,
1. Mod. 211. S. C. 2. Mod. 170.
Shardlow v. Naylor, 1. Salk. 313.
Jenkin v. Whitehouse, 1. Burr. 431.
Cohay v. Sydenham, 2. Brown's C. C.

391. Stone v. Forsyth, Dougl. 707.
Fettyplace v. Gages, 3. Brown's C. C.
8. Rex v. Betteworth, 2. Stra. 891.
1111. 1118.

* [222]

Case 285.

* The Queen against Grantham.

An indictment
will not lie for
borrowing mo-
ney of one man
in the name of
another, though
without autho-
rity.

MR. DEE moved in arrest of judgment upon an indictment
against the defendant for coming in the name of *Jones* and
borrowing money, and promising that *Jones* would repay it; *ubi*
REVERA Jones never sent her, of which she was found guilty.
He said, that an indictment would not lie, for she brought no *token*
with her.

MR. BAINS cited the case of *The Queen v. Jones* (a), which
was exactly the same case, and the indictment was quashed, though
there was a *token* brought.

HOLT, *Chief Justice*, said, he remembered a case where a lusty
fellow came to a shop to buy goods, and upon his affirming that he
was of age, the shop-keeper trusted him; after, upon his refusing
to pay for the goods, the shop-keeper brought an *indebitatus as-
sumpsit*, to which he pleaded that he was not of age; upon that, the
shop-keeper brought an action on the case for *the deceit*; and upon

(a) Hilary Term, 2. Queen Anne, 2. Ld. Ray. 1013. S. C. Salk. 379. S. C.
6. Mod. 105.

motion

Easter Term, 8. Queen Anne, In B. R.

motion in arrest of judgment, it was adjudged, that the action did well lie, for else non-age would have a privilege of cheating (a); but if an action will not lie for the fraud, certainly an indictment will not lie. 2.

THE QUEEN
against
GRANTHAM.

THE COURT offered, that it might be spoke to again.

But MR. RAYMOND, who was for the queen, seemed satisfied that the indictment did not lie: he said, he remembered the case cited by MR. BAINS (b).

(a) See the case of Johnston v. Pie, 1. Lev. 169. which from the circumstances seems to be the case cited; but it was there held, that the action would not lie, S. C. 1. Sid. 258.

(b) HOLY, Chief Justice, said in this case, "It is no crime unless he came with false tokens. Shall we indict a man for making a fool of another?" 2. Ld. Ray. 1013. S. P. Rex v. Bryan, 2. Stra. 866. Rex v. Munoz, 2. Stra. 1127. Rex v. Nehutt, 1. Salk. 151. See also Rex v. Combrune, 1. Wils. 301. Rex v. Wheatley, 2. Burr. 1126.; and it seems to be settled, that the deceitful

receiving of money from one man to another's use, upon a false pretence of having a message to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie, against which common prudence and caution may be sufficient security, 2. Hawk. P. C. 7th edit. ch. 71. f. 2. Rex v. Bower, Cowp. 323. See also, the statute 32. Hen. 8. c. 1. of False Tokens; and 33. Geo. 2. c. 24. of False Pretences, with the several cases adjudged thereon, 2. Hawk. P. C. 7th edit. 116, 117.

The Queen against The Inhabitants of Puttenham. Case 286.

A MOTION was made to quash an order of sessions.

The exception taken was, that it did not appear that there was any complaint of the overseers, only *A. B. &c. quorum unus*, do order, &c.

Justices cannot make an order of maintenance except on complaint of the overseers.

* PER CURIAM. The justices have no power but upon complaint of the overseers;

* [223]

For which reason the order was quashed.

A like order of sessions between *The Queen* and *Inhabitants of Crediton* was also quashed, for the same reason.

Anonymous.

Case 287.

A. AND B. being joint merchants, have goods jointly between them. A. delivers the whole to C. in trust for his executors, and dies, and C. delivers them to the executors accordingly; and B. as survivor brings *trover* against C.

No survivorship between joint merchants.

THE

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ANONYMOUS. THE COURT held, that there is no survivorship in merchandize (a), but an account given by the statute; and C. having performed his trust is discharged, so that the action should be brought against the executor (b).

- (a) Co. Lit. 182. 11. Co. 3. Ex parte Drake, cited 1. Atk. 225.
2. Brownl. 99. 16. Viner Abr. 242. Smith v. Barrow,
(b) Brown v. Hedges, 1. Salk. 290. 2. Term Rep. 476.

Case 288.

Buston against Ridley.

Recognizance a record, &c. IN EJECTMENT, R. Bradbourn being seised in fee, in the year 1658, entered into a recognizance before J. GLYNN, then Chief Justice of the common pleas. Then a recital of the process out of chancery upon the statute of Henry the Eighth, and an extent out of chancery thereupon. Two administrations were granted, one out of Durham, the other out of London.

SIR EDWARD NORTHEY urged, there was no such recognizance; for "J. Glynn," he said, never was Chief Justice.

Administration where bona notabilia, &c.

PER CURIAM. Where a man has bona notabilia in two provinces, there must be a double administration. But where a man has bona notabilia in one province, and goods only in one diocese in another province, there the (archbishop's) prerogative takes place (a). And so if there be not bona notabilia in both provinces, the archbishop of the province where the bona notabilia are shall grant the administration. A recognizance is a record, * but inferior to a judgment.

* [224]

NOTE, HOLT, Chief Justice, called it a packet-record.

CHESHIRE, Serjeant. Non constat that this recognizance was ever enrolled, and that it was only ambulatory; and then the person that intitles himself to it must take out administration where it was found; but a record in one place is a record in all, &c. and they have not shewed where this recognizance was found. And because it was acknowledged, it is not therefore necessarily to be presumed that it was enrolled; for though there is an officer appointed to enroll it, yet he may have neglected doing it, and for such neglect a penalty is appointed (by the statute).

Recognizance a record where taken, and local.

HOLT, Chief Justice. The statute, i. e. the recognizance, is ambulatory, and is not certified into the chancery till the extent.

- (a) Quare, Of goods only in one diocese in another province there the archbishop's prerogative takes place.— NOTE to former edition.

POWELL,

Easter Term, 8. Queen Anne, In B. R.

POWELL, *Justice*. If it appear to be taken at a Judge's chamber in *Fleet-street*, &c. it makes it local.

BUSTON
against
RIDLEY.

Quod fuit concessum.

And yet HE held it to be a record, upon the taking of it, before the enrollment; and said, that the enrollment was by a statute in *Queen Elizabeth's* time.

And the Court seemed to agree, that it is a record where it is taken, and so local.

Sed adjournatur.

AT

AT
THE SITTINGS
IN
EASTER TERM,

The Eighth of Queen Anne,

AT
Guildhall,

BEFORE

Sir John Holt, Knt. Chief Justice.

Anonymous.

Case 289.

IN an action of assault and battery brought by the husband against the defendant for an intent to ravish his wife, she was admitted a witness.

In an action of assault by a husband, for an intent to ravish his wife, his wife is a competent witness.

HOLT, *Chief Justice*, said, it was because the wife cannot give any consent, though it be not felony.

Co. Lit. 6.
1. Stra. 504.
527.
2. Stra. 1032.

HOLT, *Chief Justice*, held, that *A.* having laid five pounds on the event of the cause, was no objection to the wife of *A.* being admitted to be a witness, because it shall not be in the power of a third person to disqualify one who otherwise would be a good witness;

And thereupon she was admitted to give evidence (*a*).

(*a*) The general rule is, that husband and wife cannot be witnesses for or against each other. *Hill v. Hill*, 2. Stra. 1092. *Harper v. Broughton*, 2. Ld. Ray. 752. *Barker v. Dixie*, B. R. H. 264. *Field v. Curtis*, Cowp. 829. *Rex v. Rudd*, Cases Crown Law, 134. *Rex v. Cliviger*, 2. Term Rep. 263. *Davis v. Durwoody*, 4. Term Rep. 678. But there are some exceptions to this rule, as in

cases of high treason, Ray. 1. Brownl. 47. 4. Hawk. P. C. c. 46. f. 70. *Sed quere*, 1. Hale P. C. 301. and rape, Lord Audley's Case, Hutt. 116.; and forcible marriage, Fulwood's Case, Cro. Car. 488. *Perry's Case*, 4. Hawk. P. C. ch. 46. f. 79.; and, as in the principal case, in assault and battery, *Rex v. Azir*, 1. Stra. 633.

There is a great deal of talk about the "new" and "old" of the world, but the fact is that the world is always new. The only thing that is old is the human mind, and it is the mind that is the source of all our knowledge and our progress. The world is a vast and beautiful place, and it is our duty to explore it and to make the most of it. We must not be content with the old and the familiar, but we must seek for the new and the unknown. For it is in the new and the unknown that we find the greatest opportunities for growth and development. The world is a great and wonderful place, and it is our duty to make the most of it. We must not be content with the old and the familiar, but we must seek for the new and the unknown. For it is in the new and the unknown that we find the greatest opportunities for growth and development.

[illegible]

AT
THE SITTINGS

AFTER
EASTER TERM,

The Eighth of Queen Anne,

AT
Westminster,

BEFORE

Sir John Holt, *Knt. Chief Justice.*

* [225]

* Brown against The Corporation of London.

Cafe 290.

UPON an issue joined upon a prescription for a toll, the defendant produced a witness.

A freeman of a corporation disfranchised without having been summoned, cannot be examined as a witness in a cause for a toll claimed by the corporation.

Bull. N. P. 290.

The plaintiff objected, that he was a *freeman*, and so interested.

Upon which the defendants produced a judgment in THE MAYOR'S COURT, where, upon a *scire facias* awarded, and two *nibils* returned, they had given judgment of his disfranchisement:

But upon inquiry, the man said, he never was summoned, and knew nothing of his disfranchisement; therefore the proceeding being irregular,

HOLT, *Chief Justice*, would not admit the man to give evidence, because the judgment in the mayor's court may be avoided.

In this case it was likewise said by HOLT, *Chief Justice*, that a man who uses a way may give evidence whether a toll has been paid; and so in the case of a nuisance; but if he contribute anything towards the carrying on of the suit, he cannot be a witness (a).

(a) Rex v. City of London, 2. Lev. Stra 659. Wallin v. Shelly, 1. Term Rep. 302. Bent v. Baker, 3. Term Rep. 27.
255. S. C. 2. Show. 146. Rex v. Carpenter, 2. Show. 47. Somerset v. France,

Easter Term, 8. Queen Anne, In B. R.

Case 291.

Anonymous.

In what case an executor shall be bound by the inventory exhibited on proving the will.

3. Burr. 1922.

ACTION OF DEBT upon a bond against an executor, who pleaded *plenè administravit*.

The plaintiff's Counsel gave into court *the inventory* taken in the spiritual court, and put it upon the defendant to discharge himself.

HOLT, *Chief Justice*, said, that where in *the inventory* it was set down "desperate debts," those shall not be *assets*, unless the plaintiff can prove that the defendant has received them. But those debts which are not set down "desperate," whether arrears of rent, or any other, shall be accounted *assets*, whether paid or not.

AT
THE SITTINGS

AFTER
EASTER TERM,

The Eighth of Queen Anne,

AT
Guildhall,

BEFORE
Sir John Holt, Knt. Chief Justice.

* Garnet against Clarke.

* [226]

Cafe 292.

ASSUMPSIT upon a promissory note, whereby the defendant promised to pay so much upon account of his mother:

A promissory note to pay on account of his mother is not within the 3. & 4. Ann. c. 9.

And IT BEING OBJECTED, that there was no consideration to it;

1. Stra. 629.

HOLT, Chief Justice, said, that a promise "to pay to J. S." is good; but a promise "to pay to J. S. upon account of J. N." is not good, for that is not within the words or meaning of the statute 3. & 4. Ann. c. 9. The consideration implied in the statute is, that when the party promises upon his own account, it must be presumed he is indebted, or else he would not promise to pay it; *aliter* where the promise is to pay upon account of a third person (a).

In this case HOLT, Chief Justice, directed a verdict for the plaintiff, but under controul, and ordered THE POSTEA to be stayed.

(a) See Banbury v. Liffets, 2. Stra. 1211. Peirson v. Dunlop, Cowp. 571. Smith v. Kendal, 6. Term Rep. 123.

Easter Term, 8. Queen Anne, In B. R.

Case 293.

Mason *against* Hogden.

A *factor* may be
a witness.

HOLT, *Chief Justice*, said, That barely being a *factor* does not incapacitate a man from being a witness in a cause; otherwise if he be interested (a).

(a) See *Schooling v. Grampire*, Others *v. Cooper*, 3. Will. 40. Ball 2.
12. Viner, 25. pl. 36. Dixon and Bostock, 1. Stra. 575.

TRINITY

TRINITY TERM,

The Eighth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir James Montague, *Knt. Attorney General.*

Sir Robert Eyre, *Knt. Solicitor General.*

* The Queen against Jennings.

* [227]

Case 294.

MR. RAYMOND moved to quash an indictment against the defendant, for refusing to take upon him the office of a high constable, *licet debito et legali modo electus* (not taying to what), at a court-leet held for the hundred of Farnham, on the sixteenth day of September.

In an indictment for not serving the office of constable, stating that he was duly elected at a court leet, it shall be presumed that he was elected to the office of high constable.
S. C. ante, 215.

The exceptions he took were,

FIRST, That it was not said to what he was elected, only *licet debito et legali modo electus, &c.*

Sed non allocatur. For PER CURIAM, It shall be presumed that it was to the office of a high constable.

SECONDLY, It is said, "*electus fuit* at a court-leet held on the sixteenth of September." Now MAGNA CHARTA, c. 5. enacts, "that all leets shall not be held *nisi bis in anno*, once within a month after *Easter*, and the other within a month after *Michaelmas* (a)," and this court is said to be held on the sixteenth of September, and they have not laid any prescription to hold it at that time, contrary to the statute.

In an indictment for refusing to serve the office of constable, it must appear that the court leet was held at the time prescribed by

magna charta, but it may be held at another time by prescription.

(a) See Dyer, 151. Harg. Co. Lit. 117. notis. 3. Hawk. P. C. ch. 10. f. 4. and 8.

Trinity Term, 8. Queen Anne, In B. R.

THE QUEEN
against
JENNINGS.

SIR EDWARD NORTHEY said, that so it was in the case of *Rex v. King* (a), but there the Court held the indictment good notwithstanding.

RAYMOND answered, that the reason of that case was, because by the pleading over they had admitted it, but here we have pleaded not guilty.

HOLT, *Chief Justice*, said, that an admittance, by pleading to an indictment, does not make the indictment good, as it would a declaration.

* [228]

* SIR EDWARD NORTHEY likewise said, that one may prescribe to hold a court-leet at another time than is named in MAGNA CHARTA; and it shall be presumed that this was so.

HOLT, *Chief Justice*, and THE COURT answered, that indeed one may prescribe so, but unless that prescription appear, it shall not be presumed (b). Also, when a presentment in a leet is removed by *certiorari*, the stile of the court must be set out exactly, but there needs no such nicety in pleading (c).

And the indictment was quashed.

(a) 3. Keb. 297.

(b) See Partridge's Case, Cro. Eliz. 125. S. C. 2. Leon. 28. 212. Porter v. Gray, Cro. Eliz. 245. Rex v. King, 3. Keb. 230. Dakin's Case, 2. Saund. 290. Fletcher v. Ingram, 1. Ld. Ray. 69. Rex v. Barnard, 1. Ld. Ray. 94.

S. C. 12 Mod. 115. S. C. Skin. 669.

3. Hawk. P. C. 7th edit. c. 10. f. 8. and Mr. Hargrave's Notes 10, 11, and 12. 10 Co. Lit. 115. a.

(c) King's Case, Cro. Jac. 43. See also 4. Bac. Abr. 672.

Case 295.

Young against Slaughterford.

A juror having been on the grand jury, or of the coroner's inquest, or being uncle to the prisoner, are good causes of challenge.
S. C. ante, 217.

AT A TRIAL AT BAR in an appeal of murder; HOLT, *Chief Justice*, said, to which the rest did not dissent, that it was a good cause of challenge by the appellee to one of the jury, that he was one of the grand jury who found the bill against the appellee, upon which he was indicted at *Kingston* assizes: Also that the being of the coroner's inquest, is good cause of challenge by the appellee: Also being uncle to the appellee, is good cause of challenge by the appellant.

But the appellee denying him to be any relation, THE COURT directed it to be tried on a *voir dire*.

An infant of any age may be sworn as a witness, if he is conscious of the danger of perjury.

Cases Cro. Law, 104. 182.

One being produced to be a witness against the appellee who was under twelve years of age,

The appellee's Counsel objected to him for that reason; and besides, they said he had taken money.

HOLT, *Chief Justice*, said, that if he knew the danger of an oath, he might be a witness: And that appearing, he was admitted.

And

Trinity Term, 8. Queen Anne, In B. R.

And SECONDLY, Suppose he had taken money, that is no reason why his testimony shall not be taken; but if it be proved, the jury may give the less credit to his evidence. But suppose one gives or promises a witness money if the cause go on that side, he cannot be admitted to give evidence.

It is no objection to a witness that he has received money from one of the parties.

* SIR PETER KING objected, that in an indictment evidence of discourse preceding the fact is not to be given.

* [229]

But HOLT, Chief Justice, said, that they might give in evidence anything that explains the fact.

In murder, a discourse antecedent to the fact may be given in evidence.

THE APPELLER being found guilty of the murder, came afterwards to receive the judgment of the Court; and being arraigned, and asked what he had to say why judgment should not be given:

The words "day, year, hour, and place as forefaid," in an appeal, shall refer to the fact, and not to the person.

MR. EYRE, Solicitor General, moved in arrest of judgment, that the appeal was not good; and took his exceptions to it.

FIRST, That there are two places mentioned in the appeal, viz. that he was commorant at *Shalford*, and that the fact was done at *Compton*; afterwards it says, "*die, anno, hora, et loco præd. eandem JANE YOUNG percussit.*"

SECONDLY, There is no venue laid to the assault; for it is said that the deceased being at *Compton*, &c. "*venit præd. CHRISTOP. SLAUGHTERFORD felonice, voluntariè, et ex malitiâ suâ præcogitata ut felo dictæ dominæ reginæ nunc, ac contra pacem, &c. die et hora præd. apud COMPTON præd. in com. SURRIE, vi et armis, &c. ac in et super eandem JANE YOUNG, in pace Dei et dictæ dominæ reginæ ut præfertur existen. felonice, voluntariè, et ex malitiâ suâ præcogitata insultum fecit;*" so that the venue is only laid to the *venit vi et armis*, for the "*ac*" separates the sentence; and if an assault be necessary, it is necessary to lay a venue, for it is traversable; it should have been *tunc et ibidem insultum fecit*.

Of the venue in an appeal of death.

At first HOLT, Chief Justice, POWYS and GOULD, Justices, were clear that neither exception was good;

But POWELL, Justice, doubted:

And the matter being put off to the next day,

HOLT, Chief Justice, was of opinion, that neither exception was material. As to THE FIRST, when one place is the man's addition, the other the fact, certainly "*die, hora et loco præd.*" shall refer to the place of the fact; and it is as well as if it had been *eodem*, for the place of the fact is the last before the *præd.*

As to the other exception, it is not material, for the assault is not necessary, for *percussit* is a sufficient assault. As to *Long's Case*, where *percussit* was omitted, that was * shewing the consequence without the cause: *percussit* implies an assault, but if it did not, here it is said, "*venit vi et armis*" to *Compton*, "*ac insultum fecit*" &c. *ac cum quodam baculo, &c. percussit, dans eidem J. Y. unum*
" mortale

* [230]

Trinity Term, 8. Queen Anne, In B. R.

YOUNG
against
SLAUGHTER-
FORD.

"*mortale vulnus, de quo quidem vulnere instanter obiit*;" so that if the assault was necessary in the *venue*, here it would be sufficiently set forth.

POWELL, *Justice*, said, as to the first exception, the precedents are *die, hora et loco præd.* But in an appeal there needs no addition, for it is not within the statute of Additions; and it being said "*apud COMPTON instanter obiit*," ties down the stroke to the place of the death.

As to the second he said, that "*dedit mortale vulnus*" would be bad. But in this case, there cannot be a stroke without an assault. The old precedents are "*insidiando et ex insultu*." But upon the petition of the clergy, because it took away the benefit of the clergy, in the time of *Henry the Sixth* it was left out, and afterwards it was only *ex insultu*. In the case of *Burgh v. Holdcroft (a)*, there is no assault laid; and indeed where there is *percussit*, as in this case, there needs none.

POWYS and GOULD, *Justices*, were of the same opinion.

Variance be-
tween the *venire*
and *distringas*.

Then SIR PETER KING said, there was a variance between the *venire* and the *distringas*; for the addition of one of the jury is "*de Chiddington*," and it is "*Cheddington*" in the *distringas*; and he said it was like "*Palus*" for "*Paulus*," or "*Constantanus*" for "*Constantinus*."

But it appearing that that man was challenged by the appellee,

THE COURT disallowed the exception;

And judgment was given *quod suspendetur per collum*.

POWELL, *Justice*, gave the sentence: and THE COURT ordered a rule to the sheriff of *Surry* to receive the body.

(a) Coke's Entries, 53.

Case 296.

Smith against Bowen,

An appeal of
murder laid

"*post meridiem*,
"*circa decimum*
"*horam ejusdem*
"*diei*," is suf-
ficient.

S. C. ante, 216.

* [231]

S. C. Holt, 355.

S. C. Ld. Ray.

1288.

S. C. Ray. Ent.

536.

THE APPELLEE *Bowen* having demurred to the appeal, Mr. PENGELLY took exceptions to it.

FIRST, That the murder is laid to be done "*post meridiem, circa decimam horam ejusdem diei*;" and if the murder be* in the night, by the statute of *Gloucester, cap. 9.* it must be pleaded in *nocte ejusdem diei*; and though in *July* it be not dark at ten, yet it must be so pleaded.

HOLT, *Chief Justice*. In murder this is sufficient; but in an indictment for burglary it would have been bad; for there it must be said "*in nocte, &c.*" because it is not burglary unless it be in the night.

SECOND

Trinity Term, 8. Queen Anne, In B. R.

SECOND EXCEPTION. It does not say, the assault was "*vi et armis*," only *venit vi et armis et insultum fecit*; and cited *Wilson v. Laws* (a). *Vi et armis* in an appeal, shall extend to the whole charge.

THIRD EXCEPTION. There is no place set forth where the stroke was given; for it is said "*die et loco præd. insult. fecit*;" now before it is mentioned where the pledges lived, and afterwards where "*venit vi et armis*;" now "*præd.*" may refer to the place afore-mentioned, viz. where the pledges lived; so that there is no *venue* laid to the assault.

FOURTH EXCEPTION. In the appeal it is "*murdrum*" for Variance: "*murdrum*," and "*Georius*" for "*Georgius*." But upon examination of the bill that was filed, it was right.

Then the appellant's Counsel moved, that THE ROLL might be amended by the bill; which the appellee's Counsel opposed, and said, that none of the statutes for amendments extend to appeals; and cited *Tuchin's Case* (b), and the case of *Hoyle v. Pitt* (c).

As to the above exceptions;

HOLT, Chief Justice, said, that the "*vi et armis*" shall extend to all, and not only to the *venit* (d). And this is not like the case of battery or trespass, for there there is a fine due to the queen.

As to THE THIRD EXCEPTION, that "*præd.*" is good, for the place mentioned where the pledges live, is not part of the appeal.

As to THE FOURTH EXCEPTION, that he thought there needed no amendment; but if there does it may be amended. Suppose in an action of trespass there is an omission of *vi et armis* in the declaration, and the original is right, the declaration may be amended by it. But as to the mistake of "*Georius*" for "*Georgius*," it is in the fresh suit, which since the *statute of Gloucester* need not be set forth; for if an appeal be prosecuted within a year and a day, it is sufficient.

* But he said there was a mistake in awarding *the venire*; for it is by *cesset processus*, but he thought the right way was *per vicecomes non misit breve*.

* [232]

As to the amendment, POWELL, Justice, said, that by the common law the roll might be amended by the bill, and cited 7. Hen. 4. c. 27. and *Brook, tit. "Amendment"* 101. where an appeal was amended. But the original in appeal is not amendable. 8. Co. 156.

POWYS and GOULD, Justices, were of the same opinion.

(a) 4. Mod. 290. S. C. 1. Salk. 59.
8. C. 2. Salk. 589. S. C. Comb. 293.
S. C. Carth. 331. S. C. 3. Salk. 380.
S. C. Skin. 443. 549. 551. S. C. Holt,
62. S. C. 1. Ld. Ray. 20.

(b) 6. Mod. 164. 268.
(c) 4. Mod. 158. 3. Salk. 38.
(d) See Coke's Entries, 59.

But

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SMITH
against
BOWEN.

But upon the objection started by HOLT, *Chief Justice*, the matter was put off to the next day;

When MR. PENGELLY for the appellee argued, that in this case there was a discontinuance of the issue; for it is entered "*quoad triand. exitum præd. cesset processus, &c.*" whereas the venire should have been continued by a *vicecomes non misit breve*.

MR. WHITACRE *contra*; said, it was held well in the case of *Armstrong v. Lisle (a)*;

To which MR. RAYMOND answered, that in that case there was judgment for the defendant before demurrer, so that a *cesset exitum* was sufficient.

MR. EYRE said, that this was a discontinuance; for here is a *dies datus* to the demurrer, and a *cesset processus* to the issue, until the demurrer be determined; and the precedents are otherwise, and cited *Rast. 341. 555. 667. Co. Ent. 141. 476. 493. 59. Rast. 49.* and the case of *Egerton v. Morton, 1. Bulstrode, 69.*

LUTWYCH *contra* said, that an appeal differed from a civil action; for here one may demur to the whole, and likewise take issue to the whole; but not in a civil action, and all the precedents cited are of civil actions. But in the case of an appeal, where there are two pleas to the whole, it is better with a *cesset processus* to the venire, because there will be no need of a venire, if the demurrer be adjudged for the defendant; but it is good either way; and in *Co. Ent. 59. Bulstrode, 69.* it is adjudged in point.

MR. EYRE, *Solicitor General*, replied, that in those cases there was judgment for the defendant.

To which HOLT, *Chief Justice*, answered, that though there was judgment for the defendant in those cases, yet the entry of a *cesset processus* was not the cause of it, for if there was a discontinuance, the * Court could have given no judgment at all. If a *quare impedit* be brought against three, two plead in abatement, and the other in bar, and judgment is given for the plaintiff as to the two; then it must be entered, but there must be a *cesset executio*; and if judgment be given for the third defendant, and a verdict for the plaintiff, then the *cesset executio* will be continued as to the other two.

THE COURT gave their opinion as follows.

HOLT, *Chief Justice*, said, that upon consideration they were of opinion, that this is the most proper way; for it is in vain to proceed to issue, until the demurrer be determined; for if the bill abate, there is an end.

1. Appeal where amendable.

As to the amending the appeal by the original bill, it is amendable at common law; but if not, yet it is by 14. *Edw. 3. c. 6.* and

(a) 1. *Kely. 59. 93. Tremain, 20. Skinner, 670. Carth. 394. Comb. 410. Salk. 60. 12. Mod. 123. 157. Holt, 63.*

cited

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cited *Blackmoor's Case* (a); for appeals are not excepted out of that statute.

SMITH
against
BOWEN.

It was doubted, whether a plea might be amended after judgment upon error, and that was upon the word *process*, which was thought did not extend to any plea after judgment upon error; to amend which the statute 9. *Hen.* 5. c. 4. was made, which it did by adding the word *record*, and the statute 4. *Hen.* 6. c. 3. made that perpetual; in none of which statutes appeals are excepted: the statute 8. *Hen.* 6. enlarges the power of the Judges; but in this appeals are excepted; he cited the case of *Sir H. Tufton v. Sir John Ashley* (b), an amendment in a *quo warranto*, and concluded, that it should be amended; for the aforesaid statutes extend to appeals, where by the record itself it appears to be a mistake of the clerk.

POWELL, *Justice*, said, there were very few things that were amendable at common law; a misprision of a clerk was not, if there was nothing to amend it by; but this is amending one part of the roll by the other, viz. the recital by the bill; in this case the bill is *verbatim* the same as the count; but in most cases it is otherwise. As to the statutes, I see no reason why an appeal, which is a civil process, is not within them, where it is not excepted. But I ground my opinion upon the common law. * As to the discontinuance, I think one way is as good as the other; without the order of the Court, it would be a discontinuance. But we have power to stay the issue until after the demurrer; and this appears to be so by the entry, viz. "*cesset processus quousq. eadem materia in lege aliquo legitimo modo terminetur*;" and that this way is usual as well as the other, the precedents cited shew.

* [234]

POWYS and GOULD, *Justices*, *idem pro eadem ratione*.

And THE COURT ordered, that the roll should be amended.

(a) 2. Co. 156.

(b) Cro. Car. 144.

Mascal against Davys.

Case 297.

A MOTION was made to discharge one who was a prisoner, upon the act of parliament for Lifting.

A person who insists into the army, after verdict against him, may be taken in execution.

The case was, there was a trial, and after verdict for the plaintiff, the defendant lifted himself; and *Hucks's Case* last Term was cited, where one was discharged upon an *excommunicato capiendo*, he being so enlisted.

HOLT, *Chief Justice*, said, he was never of opinion, that executions were within the act, though the Judges of the common pleas were of that opinion.

But

Trinity Term, 8. Queen Anne, In B. R.

MASCAL
against
DAVY.

But there appearing to be fraud in this case, the defendant could not be discharged, though it had been upon *mesne process*, much less on an execution (a).

(a) See Anonymous, ante; 192. *Mason v. Vowson*, post. 252.

Case 298.

The Duke of Richmond against Costelow.

The venue cannot be changed in *scandalum magnatum*, but upon special cause.

SIR PETER KING moved to change a venue in an action of *scandalum magnatum*; and cited *Lord Shaftsbury's Case* (a).

HOLT, Chief Justice, said, the reason in *Lord Shaftsbury's Case* was, because he had an interest in THE CITY, and therefore he could not have an impartial jury there; and where there is a special cause, it is in the discretion of the Court, whether they will do it or not. But it is not usual to grant it upon the common affidavit.

* [235]

* SIR PETER KING said, that this action is given by the statute of *Richard the Second* (b), and that imposes a fine for the contempt to the Crown; and the late act of pardon dispenses with that.

To which HOLT, Chief Justice, answered, that it did not pardon the private offence;

And THE COURT refused to change the venue (c).

(a) *Shaftsbury v. Craddock*, 2. Jones, 192. 1. Vent. 363. Skin. 40. 2. Show. 197.

(b) 2. Rich. 2. c. 5.

(c) That the Court will not change the venue in an action for *scandalum magnatum*, see 1. Lev. 56. 2. Salk. 668. Carth. 400. 2. Stra. 307. Gilb. C. B.

90. Tidd's Practice, 359. except in cases of necessity, Loft, 50. 3. Bl. Com. 384. or where local prejudices or interests might defeat the ends of justice, Stra. 874. Burr. 1564. Cowp. 510. 1. Will. 77. Ld. Ray. 1418. Sellon's Practice, 270.

Case 299.

Anonymous.

Finding an able man any time after listing, sufficient to intitle to the benefit of the listing act, if the man continue in the service.

MR. SERJEANT DEE moved to discharge one upon common bail, upon the listing act.

The case was, One was listed into the queen's service, served some time, and afterwards was discharged, upon his finding another able-bodied man, who is now in the army.

The question was, Whether the clause in the act, "or find another able-bodied man," shall refer to the time of his listing before a justice of the peace? or, Whether any time afterwards will do, provided the man whom he finds continues in the service?

THE COURT were of opinion, that the latter was sufficient; and thereupon the man was discharged.

The

Trinity Term, 8. Queen Anne, In B. R.

The Queen *against* Baker and Others.

Case 300.

SIR EDWARD NORTHEY moved to quash a conviction of forcible entry, because there wanted *manu forti intravit*.

Conviction of forcible entry quashed for want of *manu forti*.

Upon reading the conviction it was *vi et armis intravit*;

Which THE COURT said was bad; for it might be *vi et armis* and not *manu forti*, which are the words of the statute.

Therefore quashed (a).

(a) Warner and Collins' Case, Cro. Elz. 461. Beverley's Case, Latch, 224. Rex v. Cox, 2. Bulst. 258. Anonymous, 1. Vent. 265. Rex v. Watson,

2. Keb. 133. Rex v. John Storr, 3. Burr. 1698. Rex v. Baker and Others, 3. Burr. 1731.

The Queen *against* Tyrrell and Barber.

Case 301.

AN INFORMATION in nature of a *quo warranto*, judgment *per nihil dicit*, and a *capiatur pro fine*;

Information in nature of *quo warranto*, judgment *per nihil dicit*, and a *capiatur pro fine*; the fine is pardoned by the late act, but not the offence to a private person.

The question was, Whether this was pardoned by the late act?

* This cause was spoken to in *Easter Term*; and this Term

HOLT, Chief Justice, delivered his opinion, that an *interlocutory judgment* is not within the exception in the act; for by a "judgment" is meant a *final judgment*, it being coupled with "sentence and decree;" and a *capiatur pro fine* is only to bring them in to receive the judgment of the Court. But this being a matter of right, viz. in a *quo warranto*, though the fine be pardoned, yet the continuance of the crime is not: and he said, he remembered a case upon the act of Pardon in King William's time, where the fine for a nuisance was pardoned, but not the continuance of the nuisance. He said likewise, that where writs of error say "*si iudicium inde redditum sit*," it extends only to final judgments; and so does the exception in the act of parliament.

* [236]

POWELL, POWYS, and GOULD, Justices, were of the same opinion;

Wherefore judgment was given, that the defendant should be ousted of his office for committing the offence; but that the fine is pardoned (a).

(a) See the case of Dr. Bentley v. The Bishop of Ely, Fitzg. 107.

The Queen *against* Layton.

Case 302.

A CONVICTION of forcible entry removed by *certiorari*, and the judgment given upon the conviction was, "*quod finis imponatur, &c.*"

Judgment in a conviction of forcible entry may be entered

by *quod finis imponatur*, or *ideo consideratum*: if the former, it is removeable by *certiorari*; if the latter, by writ of error.—S. C. ante, 46. 59. S. C. Fort. 173. S. C. Salk. 106. 353 450.

The

Trinity Term, 8. Queen Anne, - In B. R.

THE QUEEN
against
LAYTON.

The question was, Whether the fine should be entered so, or
"ideo consideratum est?"

THE COURT held either way was good, there being precedents both ways. If the entry be "*quod finis imponatur*," then it is removeable by *certiorari*; if "*ideo consideratum*," then by writ of error: they cited *Gresby's Case* (a), and *Rex v. Chandler* (b).

THE COURT gave judgment on the *certiorari*, that the conviction should be affirmed.

(a) 8. Co. 38.

314. Salk. 378. 1. Ld. Ray. 545. 581.

(b) 1. Sid. 156. 1. Lev. 113. 1. Keb. 563. 572. 585. Holt, 214. 12. Mod.

5. Mod. 446.

* [237]

Case 303.

* Rice against Wilmer.

Notice in a trial
by *proviso*.

IF the defendant will bring on a trial by *PROVISO*, he must first give the plaintiff a rule of notice; or else, if the defendant be nonsuit, such nonsuit will be set aside as irregular (a).

(a) Lilly's Practical Register, 84. 87.

612. 615. 617. Dodson v. Taylor,

2. Stra. 1055. Wilkinfon v. Poole,

2. Stra. 797. Rule, Mich. Term,

4. Ann.—But now by 14. Geo. 2. c. 17.

if a plaintiff do not go to trial according

to the practice of the Court, the defendant may have judgment, as in case of a nonsuit: and for the practice of the Court upon this subject, see Tidd's Practice, 497.

Case 304.

Dillingham against Gately.

False Latin will vitiate a writ, unless where the writ sets forth the whole case, as in an action upon the case.

AN ACTION UPON THE CASE upon a *promissory note*, and a demurrer for false Latin in the original, which was "*locarent ad competum*" for "*locaret, &c.*"

MR. RAYMOND for the plaintiff said, that false Latin, if immaterial, shall not abate a writ.

PER CURIAM. In an action upon the case, the original sets out the whole matter, so that the original is as the bill; and therefore false Latin shall not vitiate it: but if it had been in a writ, for which there is an exact form in THE REGISTER, then it would be bad (a).

Judgment respondeas ouster.

(a) See the statutes 4. Geo. 2. c. 26. and 6. Geo. 2. c. 14. f. 5. by which, all proceedings whatsoever which concern

the administration of justice shall be in the English tongue and language only.

Case 305.

Collins against Delafountain.

Declaration on a
bail bond.

HOLT, Chief Justice, said, that upon an action by an assignee of a sheriff's bond, it is enough to set forth, that the bond was *pro comparentia* of the defendant; and there is no need of setting out the matter at large.

Hopwood

Hopwood *against* Barefoot.

Case 306.

IN A TRIAL before HOLT, *Chief Justice*, in an action of covenant, this case was reserved for the opinion of the Court.

Where public taxes shall be paid by the lessee or lessor.

* [238]

A building lease was made in 1672, by * *Andrew Collins*, for sixty-one years, in which there was this covenant, "that the lessee should pay all sum and sums of money that now is, or shall be assessed or taxed for and in respect of the premises demised as aforeaid, for chimney-money, church and poor, or visited houses, or otherwise, above and besides the rent reserved thereupon." In the year 1698 the lessee surrendered this lease, and a new lease was made upon the foot of the former, in which there was the same covenant as in the former lease.

After several arguments at bar, THE COURT this Term gave their opinion *seriatim*.

GOULD, *Justice*, said, that the only question was, Whether upon the wording of the covenant the lessee should pay the *land-tax*? He said, that the words "or otherwise" make it a charge upon the tenant, for they must have some intent; and this seems to be the plain intent of the parties: these two indentures refer one to the other; the tax of *royal aid* had been before the covenant was made, so was *chimney-money*, though determined at the time of making the second lease, and yet it was put in. It was objected in *The Archbishop of Canterbury's Case (a)*, where the question was, Whether lands belonging to *The College of Maidstone* should be exempt from paying tithes? that by the statute 31. *Hen. 8. c. 13.* the words of which are, "All monasteries, colleges, &c. which shall come to the king by dissolution, or any other means, shall be exempt from paying tithes;" that this coming to the king by act of parliament was not within that statute. But it was there held, that the college being given to the king by the statute 1. *Edw. 6. c. 14.* and an act of parliament being of a superior nature to all other conveyances, it is not within the general words of the statute of 31. *Hen. 8. c. 13.* "by dissolution or any other means." Likewise where the statute 13. *Eliz. c. 10.* speaks of "deans and chapters, colleges, parsons, vicars or others, having spiritual promotions;" it was resolved, that these words did not extend to bishops, *causâ quâ supra*. To which he (*i. e.* GOULD) answered, that the statute of *Marlbridge (b)* provides, "that essoins shall be admitted without oath, in curiâ baronis vel aliis curiis," and * yet it is held, that these general words extend to the courts in *Westminster-Hall*. Therefore he was of opinion for the plaintiff.

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POWYS, *Justice*, the same for the plaintiff.

POWELL, *Justice*, said, that this covenant extends to the *land-tax*; but he did not think it would extend to all taxes *in futuro*. In leases, taxes are distinguished into ordinary, which relate to poor, church, &c. and extraordinary, which relate to those imposed by parliament; and so the words "or otherwise" would not extend to

(a) 10. Co. 46.

(b) See 2. Inst. 137.

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taxes of another nature imposed by parliament. They lay great weight upon *The Archbishop of Canterbury's Case*, but he did not make any difference between persons and things; and the reason of the construction upon the statute 43. *Eliz. c. 10.* is not upon the difference between persons and things, but because they are not religious persons. If a tax be given by parliament which was never known or *in esse* before, these words in the covenant would not extend to such taxes: But if it had been worded thus, "all taxes that should be hereafter imposed by parliament" all taxes whatsoever would be included. As to the second lease, though it be said that the intent thereof must be construed by the first lease, in that I do not agree; for we must take notice of the taxes that were usual at the time of making the second lease. There are three sorts of taxes: FIRST, Tenths and fifteenths, which are upon goods; and were uncertain until the eighth year of *Edward the Third*. This continued until the time of *Queen Elizabeth*, then came in *subsidies*; by which all men having such an estate, were taxed, and called *subsidy-men*. In 1641 came in the land-tax; and to all these taxes the covenant will extend, but not to any of a different nature; and concluded for the plaintiff.

HOLT, *Chief Justice*, said, that taxes, which are for the benefit of THE CROWN, and defence of the realm, cannot be imposed but by act of parliament; yet the crown has a right to ask them, upon any emergency, so they have a virtual existence, though no actual one. 13. *Edw. 4. 15. 16. a.* And this is not an extraordinary tax, but one always *in viris* (or *in usu*). He cited a case in the thirty-third year of *Henry the Eighth*, and *Dyer, 52. pl.* where the king granted a licence to export bell metal, *non obstante* any act made or to be made; and afterwards an act was made prohibiting it; and the Judges resolved, that the act repealed the king's grant: but the Book says, "that otherwise it had been in the case of taxes (a)." He said, that it was likewise adjudged, that where A. made a lease, and covenanted to discharge the lessee of "all burthens and charges," (there being no tax at that time, but afterwards, a fifteenth being granted by parliament) the tenant was distrained for it; and this was adjudged within the covenant; because taxes are always a charge *in viris*; and that that was a stronger case than this at bar; because in the covenant there no taxes were named, as in this case. And though by the statute 4. *Will. & Mary* it is enacted, "that tenants shall pay the land-tax, and deduct it out of their rent," yet that shall not destroy this covenant (b); as where tenant in tail

(a) NOTE, A *Quare* is entered in the Book.

(b) See the case of *Cranstoun v. Clarke*, where on a lease in which rent was reserved to be paid "without any deduction or abatement whatsoever," it was resolved, that as the land-tax act enables the tenant to deduct this tax out of his rent, he has, in all cases, a right to stop it, unless there is an express agreement to the contrary. *Sayer's Rep. 78.*

But where there is an express agreement "to pay all taxes, land-tax only excepted," the lessor is only bound to allow at the rate and in the proportion to the rent at the time of the demise, and not for any increase on account of the improvement of the estate. *Hyde v. Hill, 3. Term Rep. 377.* *S. P. Yaw v. Le-man, 2. Stra. 1191.* *S. C. 1. Will. 21.* *S. P. Barnfather v. Lee, in B. R. Easter Term 26. Geo. 3.*

before

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before the statute 32. Hen. 8. c. 37. made a lease for his own life only, and entered into a recognizance not to do more; and then came the statute 32. Hen. 8. c. 28. which enabled him to make a lease for three lives, or twenty-one years; yet it was held, that that did not avoid the recognizance. If this covenant had been before 1642, it had not bound the tenant; because there had been no such tax before that time; and cited the case of *Brewster v. Kidgell* (a), in the time of *William the Third*, in point. He said, the reason why those special words in the statute 13. Eliz. c. 10. "deans and chapters, and others having spiritual promotion," did not comprehend *bishops*, was, because they were provided for in the preceding act.

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(a) Salk. 198. 615. 5. Mod. 368. Comb. 424. 466. Carth. 438. 3. Salk. 340, 32. Mod. 160. Holt, 175. 609.

Simms against Peters.

Case 307.

MR. EYRE, *Solicitor General*, moved to quash a writ of error for a variance in setting out the record: The writ mentioned only three defendants, whereas in the record in the court of common pleas there were five. Variance between writ of error and the record.

* HOLT, *Chief Justice*, thought it well; because the rest being acquitted, there was no need to name them in the writ of error. * [241]

POWELL, *Justice*, being of the contrary opinion,

Adjournatur.

But afterwards, *absente* HOLT, *Chief Justice*, the writ was quashed PER CURIAM.

AT
THE SITTINGS

AFTER
TRINITY TERM,

The Eighth of Queen Anne,

AT
Guildhall,

BEFORE
Sir John Holt, *Knt. Chief Justice*

OF
The Court of Queen's Bench.

Hall *against* the Wife of William Gates, Executrix to her Husband. Case 308.

HOLT, *Chief Justice*, said, that if a person receive a woman who has run away from her husband, and lay out money for her, the husband shall not be charged; because the wife has eloped. But if the wife continue to live with her husband, and take up necessary goods, though without the husband's consent, the husband is obliged to pay for them, unless he forbid people to trust her (a).

A husband is not obliged to pay debts contracted by his wife after elopement.

1. Sid. 129.
Skin. 323.

(a) Dyer v. East, 1. Mod. 9. Bolton v. Prentice, Stra. 1214. Morris v. Martin, Stra. 647. Manwaring v. Sands, Stra. 706. Child v. Hardyman, Stra. 875. Todd v. Stoakes, 1. Ld. Ray. 444. S. C. 12. Mod. 244. Carr v. King, 12. Mod. 372. Hatchet v. Baddeley, 2. Black. Rep. 1079.

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Cafe 309.

Crifford *against* Berry.

Indeb. assump. lies
not by C. against
B. for money or-
dered by A. to
be paid by B.
to C.

WAGES are due to A. from the *East India Company*; he orders B. to receive the money, and pay it to C. to whom he is indebted; C. brings an *indebitatus assumpsit* against B.

HOLT, *Chief Justice*, said, that the action could not be maintained by C.

Whereupon the plaintiff was nonsuited. *Vide ante.*

MICHAELMAS

MICHAELMAS TERM,

The Eighth of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir James Montague, *Knt. Attorney General.*

Sir Robert Eyre, *Knt. Solicitor General.*

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* The Queen *against* Tooley, Arch, and Lawfon.

Cafe 310.

THE DEFENDANTS were indicted at HICKS'S HALL, the one as *principal*, and the other two as *accessories*, for the murder of *John Dent*, a constable; and being tried at THE OLD BAILEY, the jury found A SPECIAL VERDICT, as follows :

If a constable ar-
rest a woman
illegally as a dis-
orderly person,
and confine her
in the round-
house, and a per-
son, endeavour-
ing to release her
from such con-
finement, sud-
denly and with-
out any prece-
dent malice, kill
a man who is
acting by the
command and in
aid of the con-
stable, it is man-
slaughter only,
and not murder.

That by a statute made in the twenty-seventh year of *Queen Elizabeth*, for the good government of *Westminster*, it is enacted, " that for reformation of disorders in that city, the dean, high steward, or his deputy, or two capital burgesses, may hear and punish incontinencies, according to the custom of *London* ; " that by the custom of *London*, any constable of any ward, parish, or precinct, may execute his office throughout the whole city ; that within the city, borough, and liberty of *Westminster*, it has been used, that every person duly appointed constable of any parish, within the liberties of the city, borough, and vill of *Westminster*, his office of constable in and through the whole city and borough of *Westminster*, and the liberties thereof, has executed and used to execute ; that on the eighth of *March*, in the eighth year of *Queen Anne*, three commissioners, duly appointed by virtue of the act for the recruiting of the army, for putting the act in execution, by virtue of that act, made a warrant under their hands and seals directed to the constables of the parish of *St. Margaret's Westminster*, within the said city of *West-*

S. C. Holt, 485.
S. C. 2. Ld. Ray.
1296.

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minster, thereby commanding the constables to make search within the said city and liberty for persons within the description of * that act; which warrant after that day was delivered to *Samuel Bray*, then and yet constable of the parish of *St. Margaret's*, to be executed; that after that day *Samuel Bray*, into the parish of *St. Paul's Covent Garden*, within the city and liberty of *Westminster*, to execute that warrant did come and was; that within the parish of *St. Paul's Covent Garden* there was and is a constable belonging to that parish; that *Bray* before had sent to *John Dent*, to assist him to execute that warrant; that after the said eighth day of *March*, between eight and nine at night, at the said parish of *St. Paul's Covent Garden*, the said *Samuel Bray*, staying to execute that warrant, one *Anne Dekins*, in the street between *the Play-house* and *the Rose Tavern*, he then and there found, whom he suspected to be a disorderly person, and then and there as a disorderly person took into his custody, as constable of the city and liberty of *Westminster*, to carry her to prison for her safe custody; that *Anne Dekins* had been before taken up by *Bray*, as constable, as a disorderly person; that at her being taken up by *Bray* on the said eighth day of *March*, she had not misbehaved herself; that *Bray* had no warrant to take her or detain her; that after the taking the said *Anne*, the prisoners (*Bray* then having her in his custody), in another place called *Covent Garden*, did meet (they being all strangers to *Anne Dekins*), drew their swords and assaulted *Bray*, to rescue her from his custody; that *Bray* shewed his constable's staff, and declared he was about the queen's business, and intended the prisoners no harm; whereupon they put up their swords, and *Bray* carried the woman to the round-house; that the prisoners a little after (the said *Anne* being in the said prison, in *Covent-Garden* aforesaid), drew their swords again, and assaulted the said *Bray* on account of the imprisonment of the said *Anne*, and to get her discharged; that *Bray* called some persons to his assistance, to keep her in custody, and to defend himself from the violence of the prisoners; that *Dent* came to his assistance; that while *Dent* was in the constable's assistance, and before any stroke given, the prisoners gave *Dent* the mortal wound in the indictment mentioned, * of which he died, as in the indictment; and that the two others were aiding and assisting him that gave the stroke; but whether the defendants were guilty, &c.

* [244]

This special verdict being removed by *certiorari* into the court of king's bench for the opinion of the Court,

MR. RAYMOND argued for the queen, that it was murder. He said there were two points to be considered in the case. FIRST, Whether *Bray* was in the execution of his office, for then it is murder. And SECONDLY, If not, yet still it is murder; because here was not a sufficient provocation.

As to THE FIRST POINT he cited *Machelley's Case* (a). Constables may seize disorderly persons, and were officers at common-

(a) 9. Co. 66.

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law (a); and not only disorderly persons but suspicious persons also (b); and we must rely on the cases cited, because the special verdict only finds her to be a *suspicious person*; and it being found, that she was a suspicious person, *Bray* had authority to seize her.

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It will be objected to me, that he being constable of *St. Margaret's*, was out of his precinct when he took up *Anne Dekins* in *St. Paul's Covent Garden* (c). To which it may be answered, that the statute 27. *Eliz.* found in the special verdict, has relative words to the city of *London*; and by custom of that city, any constable within that city may exercise this authority throughout the city; and though constables are not named in the statute, yet other peace-officers being named, a constable shall be comprehended: as if a remedial law be made, and but one person mentioned, yet it may extend to others; as the statute *De Circumspecte Agatis*; where the *Bishop of Norwich* is only named, yet all other bishops are comprehended (d). It is found that they used to exercise their authority all over *Westminster*, though they have not said time out of mind; and though in pleading it should have been set forth, yet it is well, as it is in a special verdict (e). His having a * warrant from the commissioners of the recruit act, does not hinder him from seizing a disorderly person, in breach of the peace.

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It may be objected, that she was no *disorderly person* (f). To which it may be answered, that the constable having had her before in his custody, as a disorderly person, might well suspect her again, it being between eight and nine at night, and between *the Playhouse* and *the Rose Tavern*.

As to THE SECOND POINT; supposing him not in the execution of his office, whether here was a sufficient provocation to make it *manslaughter* only? And he said it was not; for it is found, that *Anne Dekins* being in custody, the prisoners all drew their swords and assaulted *Bray*, upon which he shewed his staff; and so if there was no provocation, it is murder, for the law implies malice (g). If *Anne Dekins* had herself resisted, and killed the constable, it had been but *manslaughter*; otherwise as in this case, where a *stander-by* kills the constable. If speaking words whereby a man may suffer damage in his reputation, shall never be a sufficient provocation to make it *manslaughter* (h), much less a wrong done to a stranger; because not so great a provocation; so that in all cases there must be a proportion in the provocation; as if a man break my close,

(a) 4. Inst. 265. and the Year-Books 10. *Edw.* 4. pl. 18. a. 5. *Hen.* 7. pl. 7. b. 22. *Edw.* 4. pl. 35.

(b) Year-Books 5. *Edw.* 3. pl. 14. 13. *Hen.* 7. pl. 11. a. and *Lambard's Justice*, fol. 12.

(c) *FOSTER, Justice.* He was no constable in the precinct where the arrest and imprisonment were. *Foster C. L.* 312. *nov.*

(d) He cited *Fitz. Abr.* "Prohibition." 2. Inst. 487. Statute 1. *Rich.* 2. c. 12. and *Plowd.* 36 c.

(e) He cited 2. Roll. 699. *Trinity Term* 13. *Car.* *Alton v. Guash.*

(f) 3. *Hawk. P. C.* ch. 13. f. 6. 4. *Bl. Com.* 289. and *Rex v. Bootie*, 2. *Burr.* 864.

(g) *Hale*, 45. 3. Inst. 52.

(h) *Keil* 55.

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and I with a stake beat his brains out, it is murder (a). And there must be an open act of violence done to make it manslaughter. He said, he expected *Hopkin Huggitt's Case* (b) would be cited against him; but this case is different from that; for there they came civilly and demanded a sight of the warrant, but in this case, the very first act was an assault upon the constable, their swords were drawn and an actual fighting, which increases the provocation; here was an assault upon the person killed before a blow given by those of his party; there was no warrant, but here was a known person of the law: so upon these reasons he submitted it, FIRST, Whether he was in execution * of his office. SECONDLY, If he was not, yet here was no sufficient provocation.

MR. PENGELLY for the prisoners argued, that the constable was not a known officer; for that no authority was given to constables by 27. Eliz. for that act is not universal, as the statute *De Circumspetle Agatis*, or the statute of *Westminster*, concerning the warden of THE FLEET, but only a particular jurisdiction given to particular persons, from whom the constable had no warrant; but this warrant was given by the commissioners of the recruit act; and though in *London*, the custom may give a jurisdiction to the constables to act all over the city, yet in *Westminster* there is no such custom. The special verdict finds, that such a custom has been used in *Westminster*, but does not say "time out of mind;" and the act of *Elizabeth* being here found, makes it plain that they do not pretend to such a custom time out of mind. In the case of *The King v. Chandler* (c), it is settled, that a constable cannot go out of his precinct. But a justice of the peace, by his warrant, may appoint a constable by name to execute it anywhere within the jurisdiction of the justice of peace. It does not appear that they were appointed commissioners for this particular place or county; but it is only said, they were duly appointed commissioners; and by the act, the execution of their warrant is restrained to particular officers within their jurisdiction; and in this case there was a particular constable of *Covent Garden*, so that there was no failure of justice; and therefore the constable here usurped an authority, and consequently was a trespasser to all people he took up. But suppose he was a lawful officer, yet that will not justify acting beyond his authority; it does not appear that he acted under the recruit warrant; and though *ex officio*, if he see persons fighting he may restrain them, or take up suspicious persons, yet the taking this woman is not lawful; for she was very decent at the time, and therefore no cause of suspicion: but they should have found her to be a *night-walker*, as is usual in those cases (d).

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* Upon taking up a suspicious person, it must appear that there was just cause of suspicion, as a felony done; for the cause of sus-

(a) Mawgridge's Case, Kely. 132.

(b) 1. Hale P. C. 465. See Foster's C. L. 314.

(c) Hilary Term 11. Will. 3.

(d) He cited Hern's Pleader, 392. 488, 489. the statute 15. Edw. 1. c. 4. and Upper Bench Precedents, 111. 213. 522.

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picion is traversable (a). If the constable had no authority, he was in an actual breach of the peace, might be indicted, and is liable to all the consequences of it; but where the officer is killed in the execution of his office, no doubt it is murder (b). But in this case, if *Bray* himself had been killed, it had not been murder, much less killing an assistant. As to the provocation; it is found, that they did not see the first arrest; but they saw her under restraint, and *Bray* was continuing the trespass; when they came up, they came to rescue the woman who was unduly restrained, and their seeing her under restraint takes off all implied malice; and since it is not found that they were upon an ill design, they cannot be supposed to have any previous malice. There is in the statute of Stabbing, 1. Jac. 1. c. 8. a remarkable passage to this purpose (c). So in the case of *The Protector v. Buckner* (d), and in an anonymous case in *Keilway's Reports* (e). The constable, says MR. RAYMOND, was about the queen's business. But they drew their swords, not imagining he had any such authority; and as to their trespass growing more and more outrageous, I answer, so did the provocation. The point they went upon in *Hopkin Huggitt's Case*, was upon the restraining the liberty of the subject; and though it was objected by MR. RAYMOND, that there was fighting, yet that is not to the purpose; for in *Mawgridge's Case*, the first act of violence being done by *Mawgridge*, it was held murder, notwithstanding the resistance that *Cope* made (f). If there was no original malice against *Bray*, there could be no derivative malice to *Dent*, who came to his assistance; for where there is no malice in the principal, it cannot *egredere personam* (g).

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* Upon arguing this case,

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HOLT, Chief Justice, said, You have taken the statute 15. Edw. 3. c. 4. too largely; for certainly a suspicion barely

(a) He cited 12. Co. 92. Stiles, 166. 2. Roll. Abr. 56. 590. 559. 2. Inst. 52. 172. 3. Inst. 118. 221. 2. Vent. 22. Bro. Abr. "Commission" pl. 3.

(b) He cited Cro. Car. 371. 537. Jones, 429. Hale, 56. 4. Inst. 333.

(c) By 1. Jac. 1. c. 8. f. 2. every person who shall stab any person that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab, although not done with malice aforethought, shall be adjudged guilty of wilful murder: but it is provided, "that this shall not extend to any person, who, in keeping and preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed willingly, wilfully, and of purpose, under pretext and colour of keeping the peace."

(d) Stiles, 467. The case was this: *Harwood* and another person went to the

lodgings of *Buckner*, in *Drury-lane*, and when they were in the lodgings the assistant took down a sword in the scabbard, which hung in the room, and stood at the door of the chamber with this sword undrawn in his hand, and kept the door to keep *Buckner* from going out until they could bring a bailiff to arrest *Buckner* for a debt which he owed to *Harwood*; whereupon, upon some discourse between *Buckner* and *Harwood*, *Buckner* took a dagger out of his pocket, and stabbed *Harwood* and killed him. *Buckner* was indicted on the statute 1. Jac. 1. c. 8. and after very elaborate argument judgment was given for the prisoner.

(e) Keilw. 108. 136.

(f) Keilw. 136.

(g) Hale, 150. Dyer, 128. Countess of Salisbury's Case, Plowd. 100. Stiles, 469. Keilw. 65. Thompson's Case, Keilw. 87. 12. Co. 57. Keil. 115. conceived

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conceived by the constable, is not sufficient, without some act of lawfulness done. As to his having taken her up before, it does not appear that that was lawful; but whether it was or not, it would not justify his taking her up again (a); and though he was a constable, his staff does not give him a licence to do what he pleases (b); and if he is not in the execution of his office, but breaking the peace, then surely he may be resisted; and as for *Dent*, he assaulted her, and it is all a continuance of the same act; and though it be not lawful to rescue, yet certainly the taking her may be a provocation; and that is *Hopkin Huggit's Case*.

POWELL, *Justice*, said, he would extend this act as far as he could to suppress vice. But taking it for granted, that the constable was within his jurisdiction, yet he could not justify taking up this woman. Whenever a constable may take up any person, it must be either for an actual breach of the peace, or upon good grounds of suspicion; and the cause of his suspicion must be shewn, because it is traversable; and in case of suspicion, where there is a felony done, there is no difference between a public and a private person; but when a constable has a warrant, he is tied up to that warrant, to act only as that directs; therefore *Bray* having taken up this woman without any just cause of suspicion, she was illegally imprisoned; and therefore a provocation to all the people of *England*.

POWYS and GOULD, *Justices*, were of the same opinion.

This case was adjourned to *Serjeants-Inn*, for the opinion of THE TWELVE JUDGES;

And after several arguments, seven of them, viz. HOLT, *Chief Justice* of the king's bench, POWELL, POWYS, and GOULD, *Justices* of the king's bench; and BURY, PRICE, and LOVEL, *Barons* of the court of exchequer, were of opinion that the prisoners were guilty of *manslaughter*.

TREVOR, *Chief Justice* of the court of common pleas, TRACY, BLENOWE and DORMER, *Justices* of the common pleas; and WARD, *Chief Baron* of the court of exchequer, were of opinion that it was *murder*.

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* And the last day of the Term, the prisoners being brought to the bar of the court of king's bench,

HOLT, *Chief Justice*, delivered the opinion of THE TWELVE JUDGES, as follows.

He said, he would first shew the reasons THE SEVEN JUDGES, who thought it *manslaughter*, grounded their opinion upon; and those were,

(a) "The imprisonment of the woman in this case," says Mr. JUSTICE FOSTER, "was certainly unjustifiable." Fost. C. L. 312.

(b) See Foster's Crown Law, 311. 317.

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FIRST, That it was a sudden action, without any precedent malice, or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and if the woman was unlawfully imprisoned, then it cannot be murder; and cited *Young's Case (a)*, and *Mackelly's Case (b)*, where it is held, that if a constable be killed in the execution of his office it is murder; but it is otherwise, when he is doing a wrongful and oppressive act. It is not only necessary to make it murder, that the constable is in the execution of his office, but he must give notice that he is come to keep the peace; and cited *Thompson's Case (c)*, and so are *Young's Case* and *Mackelly's Case* to be understood; for if he do not give notice, the party may reasonably suppose that he came to assist his adversary (d).

THE QUEEN
against
TOOLEY, ARCH
AND LAWSON,

THE SECOND thing to be considered is, whether *Bray* was in the execution of his office. The statute 27. *Eliz.* does not name a constable, but only a power is thereby given to the dean, high-steward, and capital burgesses of *W. stminster*; but surely it does not follow that the constable has such a power; and WE ARE ALL AGREED, that the power of the constable is no greater than it was before this act: ONE of my brethren held, that *Bray* was constable *de facto*; but that cannot be, since there was a constable at that time of *Covent Garden*. Now if the constable of one parish has not power over the whole liberty, then *Bray* had no more authority than if he had been no constable at all. Suppose, for argument sake, that *Bray* was constable of *Covent Garden*; I AM OF OPINION that the taking up the woman was illegal, though she had been in his custody before; and if so, he did not act as a constable, but as a *common oppressor. When he had her in his custody before, the verdict does not find that she was guilty of any disorderly act; it is not a constable's suspecting, that will justify his taking up a person, but there must be just grounds of suspicion; as in case of a felony committed, and that is traversable (e). It would be hard, that the liberty of the subject should depend upon the will of the constable; and shall his not liking the woman's looks be just cause of suspicion?

* [250]

THIRDLY, The prisoners had sufficient provocation; for if one is imprisoned upon unlawful authority, it is a sufficient provocation, out of compassion, much more when it is done under colour of justice: and cited *Roylan's Case (f)*, and 12. *Co.* 87. And where the liberty of the subject is invaded, it is a provocation to all the subjects of *England*. He said, a constable cannot arrest but where he sees an actual breach of the peace; but if the affray be over, and things quiet, he cannot arrest (g). Constables have authority

(a) 4. *Co.* 40.

(b) 9. *Co.* 65. S. C. *Cro. Jac.* 279.

(c) *Keil.* 66.

(d) See *Foster's Crown Law*, 312.

(e) 2. *Inst.* 52.

(f) *Cro. Jac.*

(g) 3. *Cro.* 372. *Year-Book* 30. *Hen.* 7. fol. 10.

by

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THE QUEEN by the statute to arrest persons, but that must be by warrant from
against a justice of the peace; but in this case there was no warrant.

TOOLEY, ARCH
AND LAWSON.

The reasons of THE FIVE JUDGES that it was murder, were these.

FOUR OF THEM agreed, that the constable had no authority; but ONE was of opinion, that shewing his staff was sufficient; but I never knew that the constable's staff was of such efficacy, when the constable himself had no authority.

FOUR OF THEM held, that she being a stranger to them, it was no provocation; otherwise, if she had been a friend or servant. But surely a man ought to be concerned for MAGNA CHARTA, and the laws; and if any against the law imprison a man, he is an offender against MAGNA CHARTA.

WE SEVEN hold this to be no provocation, and we have good authority for it in *Hopkin Huggitt's Case* (a); and this case is stronger than that. The Judges who were of opinion that that case was murder, went upon this reason, viz. that he was a stranger to the person impressed; but though of a different opinion, yet gave judgment according to the opinion of the EIGHT. It was not the fighting* that made it manslaughter, but the provocation by the unlawful imprisonment; for if one without provocation draw his sword upon another, and the second draw, they fight, and after mutual passes the second is killed, it is murder.

• [251]

THE FIVE who think this case murder say, that to a relation or a friend it is a provocation, but not to a stranger; but that is a distinction not to be met with in the Books: he cited *Plowd.* 101. where two fight upon malice prepense, the servant of one of them, not knowing of the malice, comes to assist his master, and kills the other, this is held but manslaughter in the servant; which case is abridged *Hale's Pl. Cor.* 51. The reason of the case above, is not that he was servant, but because he knew not of the malice. They say that *Hopkin Huggitt's Case* is *primæ impressionis*; but yet it is of good authority, being given upon mature deliberation, and resolved by EIGHT of the Judges.

THEN they say, that in the case at bar, it could not be a provocation to the prisoners, because they knew not that she was illegally arrested; but surely *ignorantia facti* will excuse, but never condemn a man: A man in this case acts at his peril, but he must not lose his life for his ignorance of the fact, when he happens to be in the right; and cited *Sir Henry Ferrar's Case* (b), where he was arrested by a warrant that named him knight, whereas he was a baronet; and his servant killed the bailiff, this adjudged manslaughter only, because he was arrested upon an ill warrant. Suppose a man has a judgment against him, and goes abroad, and being informed, upon his return, that there are bailiffs in his house, he goes in and

(a) 1. Kely 59. S. C. 1. Ld. Ray. 143.

(b) Cro. Car. 271. kills

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kills one of them, but it proves that they are thieves that came to rob him, he is in no fault.

THE QUEEN
against
TOOLEY, ARCH
AND LAWSON.

It was likewise objected by THE FIVE, that it is dangerous to allow such a power to THE MOB; but I think THAT no proper word to be used in a court of justice; and a provocation does not make it an allowing the offence, but only a mitigation of the punishment; and for this the law makes the distinction between murder and manslaughter. They say, that the prisoners came after the imprisonment was * over; but certainly their putting her in prison, and not carrying her before a justice, as they should have done, is an aggravation; and why should Bray call Dent to his assistance after she was in prison? All agreed, that he was not constable of Covent Garden, therefore it could not be murder; for if a writ be directed to the sheriff of Middlesex, and the man steps into Bucks, the sheriff follows and arrests him in Bucks, he kills the sheriff, this is only manslaughter. I am as much for a reformation as any one, but in a legal manner; for "*Vir bonus est quis, qui consulta patrum qui leges juraque servat;*" and concluded it only manslaughter (a).

* [252]

BUT NOTE, The Court would not call the prisoners to judgment, nor let them pray the benefit of the clergy, nor suffer them to waive the queen's pardon; because the Court was bound to take notice of the late Act of Grace, as a general law, whereby the manslaughter is pardoned.

But they ordered a special entry to be made upon THE ROLL, that the Court would not give any judgment, because of the general act of pardon; therefore they were discharged as to the indictment.

Upon which the sheriff produced a writ of appeal, which was delivered to him;

And THE COURT HELD, that the prisoners were in custody as to the appeal, by the delivery of the writ to the sheriff.

(a) See Mr. Justice Foster's observations on this case, Foster C. L. 312. 314, 315.

Mason against Vowson.

Case 311.

A JUDGMENT was had against the defendant Vowson, and after judgment obtained, he voluntarily lifted himself a soldier; and after the said lifting, he was taken in execution by virtue of a *capias ad satisfaciendum* upon that judgment.

A motion was made this Term, that he might be discharged according to the late act of parliament, which says, "That any person that voluntarily lifts himself a soldier, shall not be taken out of her majesty's service by any process whatsoever."

vent him being taken in execution.

But

If a statute enact
"that no soldier
"shall be taken
"out of the ser-
"vice by any
"process what-
"soever," yet
this shall be un-
derstood by *meine*
process only, and
shall not pre-

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MASON
against
Vowson.

* [253]

But PER CURIAM, The motion was denied; for the words "any process" must be intended only of a *mesne process*, and not be extended to *executions*; for that would * be hard upon creditors, and put them without remedy.

Wherefore *Vowson* was not discharged (a).

(a) See Anonymous. ante, 191. *Masfall v. Davies*, ante, 234.

Case 312.

Mrs. Pool's Case.

Custom of London to sue a *feme-covert* trading as a *feme-sole*.

A HABEAS CORPUS was directed to THE KEEPER OF THE COMPTER, to bring up the body of — *Pool*, to which they return the custom, That a *feme-covert sole* trading shall be sued as a *feme-sole*, and that the husband is neither chargeable in body or estate.

MR. SALKELD objected, that the custom was bad, because unreasonable; for the husband might take her goods, &c. and if she were liable for debts, and not have her own goods to satisfy them, then she may be detained in custody, without possibility of ever being released.

But PER CURIAM, The husband has nothing to do with the goods or money with which she trades, and those are liable to debts. As she may be sued as a *feme-sole*, so may she sue sole for her debts owing to her within THE CITY; but for those due to her elsewhere the husband must join (a). If a woman be found guilty of a battery, and fined, the husband shall not be liable.

(a) *Moreton v. Packman*, 1 Mod. 26. 1776. S. C. 1. Black. Rep. 570. *Langham v. the Wife of John Elewet*, man v. Woollaten, 3. Term Rep. 618. Cro. Car. 68. *Lavie v. Phillips*, 3. Burr. Cawdel v. Shaw, 4. Term Rep. 361.

Case 313.

Anonymous.

Bail-bonds not assignable till four days after the return of the writ in town; six in country causes.

HOLT, Chief Justice, and the rest of the Court made it a Rule of Court, and ordered it to be screened up in the office, that no bail bond shall be assigned in town until *four days* after the return of the writ; and not until *six days* after the return in a country cause (a).

(a) The Rule was, "That where any defendant shall be arrested by the sheriffs of London or Middlesex, by process issuing out of the court of king's bench, and shall give to such sheriff a bail-bond for his appearance on the day of the return of such process, such defendant shall have leave for *four days* after that return to put in good bail at the suit of the plaintiff in such process; and within that time all proceedings upon the bail bond to the sheriff shall stay; and in case of arrest of any defendant in any other county of this

kingdom, by process issuing out of this court as aforesaid, such defendant shall have leave for *six days* to put in good bail after the return of such process, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff." And see Bullock v. Lincoln, 2. Stra. 914. that if the *latitat* be returnable on the *Wednesday* the bail-bond cannot be assigned until after *Monday*, for the *four days* are to be one inclusive and the other exclusive, and where the fourth day is *Sunday* the party has all the next day to put in bail.

Anonymous.

Anonymous.

Cafe 314.

MR. PENGELLY moved, that certain persons, bound in a recognizance to appear in the court of king's bench, for a riot, might appear by attorney and not in person, being poor people.

Appearance on a recognizance B. R. must be in person, and not by attorney.

But his motion was denied; for it is the constant practice to appear in person.

* [254]

* Fitzgerald *against* Trant.

Cafe 315.

DEBT UPON A BOND by the executor of the obligee.

A covenant not to sue one of the obligors, is no discharge as to the rest.

Upon *oyer* of the bond, it appeared that *A. B.* and *C.* were bound jointly and severally to the obligee. The defendant pleaded a release made by the obligee to *B.* one of the obligors; and upon *oyer* of the release, it appeared that the obligee covenanted with *B.* not to sue him upon this obligation.

The plaintiff demurred.

AND IT WAS ADJUDGED, that a covenant not to sue one of the obligors, where there are several, is no discharge against the others. (2.)

Judgment for the plaintiff; *absente* HOLT, Chief Justice.

Smith *against* Bowen.

Cafe 316.

THE APPEAL being tried at THE BAR this Term, the appellee was found guilty of *manslaughter* only; whereupon he prayed the benefit of his clergy:

if a person be convicted of manslaughter on an appeal of murder, the king may pardon the burning in the hand.

And THE COURT being of opinion that the statute which gives the clergy extends to appeals, and that the burning in the hand, being no part of their judgment, the queen could pardon it; according to *Biggins's Case* (a); thereupon the appellee was immediately discharged without bail (b), being pardoned by the late act of Grace.

S. C. ante, 216. 230.

S. C. Holt, 355.
S. C. Ld. Ray.
1288.

(a) 5. C. 50.—See also 3. Inst. 237. Hob. 294. and 4. Hawk. P. C. ch. 37. f. 39. where this point is fully discussed and all the cases on the subject cited.

(b) See 18. Eliz. c. 7. 4. Hawk.

P. C. c. 37. f. 40. the 10. & 11. Will 3. c. 23. 5. Ann. c. 6. 19. Geo. 3. c. 74. 4. Hawk. P. C. ch. 33. sect. 133, 134, 135.

Case 317.

Dr. Butler against Cobbet.

Mandamus to commissioners of the land-tax to tax estates equally.

MANDAMUS directed to "the vice-chancellor of Cambridge," and other commissioners of the land-tax, to make an equal assessment upon the inhabitants of *St. Andrew's Barnwell*.

SIR THOMAS PARKER moved to quash the writ; for that it should have been, to make an equal assessment upon the occupiers of the land; for every occupier may not be an inhabitant.

* [255]

* HOLT, *Chief Justice*, said, the writ was bad; but if it was good, a *mandamus* was not a proper remedy for an unequal taxation; but the proper remedy is by appeal to the commissioners: But perhaps if the assessors refuse to tax any part, as the *Case of Stirbitch Fair* is, a *mandamus* lies.

POWELL, *Justice*, said, it was usual to grant *mandamus's* to overseers, when they will make no taxation; but not upon suggestion that they intend to make an unequal tax.

A mandamus setting out the year in figures is good.

ANOTHER EXCEPTION was taken to the writ, that it set forth the year in figures; but being in *Roman figures*, it might be good for all that; otherwise if in *English figures*.

The writ was quashed *nisi*.

Case 318.

Stebbing against Warner.

In an action for words laid to have been spoken at different times, if some of them are actionable and others not, and entire damages be given, &c. judgment shall be arrested.

IN AN ACTION ON THE CASE, the declaration stated, that the defendant, endeavouring to charge the plaintiff to have him indicted for felony, said of the plaintiff these words, "Damn him he is a pick-pocket;" *et postea in presentia quamplurimarum apud*, &c. "Look here, he has picked my pocket, and taken out all my silver and gold, and damn him he is a pick-pocket;" *et postea apud N. in alio quodam colloquio*, &c. "The rogue has pulled out my pocket, and stole all my silver and gold from me;" *et postea*, &c. "He has picked my pocket of all my money, and damn the rogue, he is a pick-pocket."

SIR EDWARD NORTHEY for the plaintiff argued, that though it is not said that he *feloniously* picked the defendant's pocket, yet it must be taken in the same sense in which it was spoken; which was, that he picked his money out of his pocket, which is felony: besides it is laid, that the defendant spoke them with intent to charge the plaintiff with felony, and the jury have found it to be with that intent; for they have found the defendant guilty of the fact charged in the declaration; and he cited the cases of *Penjon v. Gooday* (a), *Ralph v. Davy* (b), *Lord Say and Sele v. Stephens* (c), *Dromant v.*

(a) Cro. Car. 327. 329.

(b) Stiles, 150.

(c) Cro. Car. 135.

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Westofer (a), *Tirlot v. Morris (b)*, *Fleming v. Gally (c)*, *Rex v. Ayres (d)*, and the cases cited in 1. Roll. Abr. 68.

STEBBING
against
WARNER.

* RAYMOND *ad idem*. The word "pick-pocket" is actionable; and he cited the case of *Mayden v. Mycocke (e)*, where "He is a clipper, and his neck shall pay for it," were held actionable; and an anonymous case in *Ventris (f)*, where "He is a clipper and a coiner" were held actionable; and the case of *Speed v. Perry (g)*, where judgment was given against the defendant, for saying of the plaintiff, "You are a rascal and a villain; you have forgot since you lived in *Black-Boy-Yard*; there you could procure broad money for gold and clip it when you had so done, and then the sheer could go."

* [256]

MR. THOMPSON, upon whose motion the defendant was to shew cause why judgment should not be arrested, said, that "pick-pocket" alone was not actionable; and the words were spoken at different times, and upon different *colloquiums*; and the intention to charge the plaintiff with felony, is laid only to the first words, viz. "damn him he is a pick-pocket;" and if words that are not actionable be joined with words actionable, but spoke at different times, and under different *colloquiums*, and intire damages given, judgment ought to be arrested; and the words being spoke at different times, one part shall not be taken to explain the other; and he cited the case of *Watts v. Rymes (h)*, where in an action for saying, "You are a pick-pocket; you picked my pocket and took away my money, and I will justify it;" the judgment was arrested, because the words themselves are not actionable.

HOLT, *Chief Justice*, &c. said, it would be hard to explain words spoken at one time by what is said afterward.

HOLT, *Chief Justice*. To say "a man is a pick-pocket, and has picked my pocket," in common acceptation is actionable, but they have over-done it; and if there are any words found that are not actionable, the judgment must be arrested:

And another day this Term the judgment was arrested.

(a) Yelv. 136.

(b) 1. Bulst. 134.

(c) 2. Brownlow, 280.

(d) 2. Brownlow, 280.

(e) T. Jones, 235.

(f) 2. Vent. 172.

(g) 2. Ld. Ray. 1185. S. C. Salk.

697.

(h) 2. Lev. 51.

Jones against Willson.

Case 319.

AN ACTION was brought by an administrator, and he declared upon two counts; one upon a promise to the intestate in his life-time, the other upon a promise to the plaintiff himself, and names himself administrator in both; and upon the trial the plaintiff was nonsuit.

If an administrator declare on two counts, one on a promise to the intestate, the other to himself as administrator, and be nonsuit, he shall pay costs for the whole.

The question was, Whether he should pay costs?

U 2

POWELL, for the whole.

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JONES
against
WILLSON.

* [257]

POWELL, *Justice* (HOLT, *Chief Justice*, absent), said, that these two counts could not be joined (a); and if an intire judgment had been given, judgment should have been arrested. But it is a question, Whether it might not have been made good, by taking judgment upon one count only (b)? But in this case the * plaintiff must pay costs (c), because the nonsuit goes to the whole:

And so it was ruled by POWELL, POWYS, and GOULD, *Justices*.

(a) See accordingly *Tate v. Whiting*, ante, 106. *Hooker v. Quilter*, 1. Willf. 171. S. C. 2. Stra. 1271. *Petrie v. Hannay*, 3. Term Rep. 659. *Jennings v. Newmar*, 4. Term Rep. 347.

Athey v. Heard, Cro. Car. 219. *Harris v. Hannay*, B. R. H. 204. *Tate v. Whiting*, ante, 196.

(c) *Cockeril v. Kynaston*, 4. Term Rep. 277.

(b) See *Mason v. Jackson*, 3. Lev. 60.

Case 320.

Anonymous.

Errors on a judgment in *Ireland* assigned here by attorney.

MR. SNELL moved, that the plaintiff in a writ of error of a judgment in *Ireland* (a), might assign his errors by attorney, upon affidavit that he was resident in *Ireland*, and offered to find sufficient bail.

Granted.

MR. HARCOURT, *Clerk of the Crown Office*, said it had been done so in the case of *York v. Medley*.

(a) See the statutes 6. Geo. 1. c. 5.; the 22. Geo. 3. c. 28.; and the 23. Geo. 3.

c. 53. that no writ of error lies now from the courts in *Ireland*.

Case 321.

Leveridge against Hoskins.

In an action on the case for digging ditches and diverting a water-course, it shall be presumed, after verdict, that the injury was consequential.

IN AN ACTION ON THE CASE the plaintiff declared, that he was possessed of a farm and a river at D. in the county of *Devon*; and that the defendant, to damage the plaintiff's farm and river, did at a place vocat. DAVYS'S CLOSE, in com. DORSET, dig two ditches, and diverted the plaintiff's water out of the rivers, and damaged the meadows; but does not say *per quod*.

MR. PENGELLY, who moved in arrest of judgment, objected, that this declaration was ill; not shewing that the diversion of the water was consequential to the digging of the ditches, which is the *git* of the action; so that this is no more than trespass.

BUT THE COURT were of opinion, that after verdict it shall be intended that it was proved to be consequential (a).

(a) A verdict cures ambiguity or an imperfect state of the plaintiff's title, but not an omission of what is the *git* of the action, *Avery v. Hole*, Cowp. 825. After verdict, nothing is to be presumed but what is either expressly stated in the declaration, or necessarily implied from those facts that are stated, *Spires v. Parker*, 1. Term Rep. 141. 145. See

also *Buxendin v. Sharp*, 2. Salk. 662. *Palgrave v. Windham*, Stra. 212. *Jeferies v. Watkins*, 3. Mod. 162. *Bird v. Geary*, 1. Show. 309. *Rex v. Bishop of Landaff*, 2. Stra. 1006. *Wicker v. Norris*, B. R. H. 116. *Frederick v. Lookup*, 4. Burr. 2018. *Stolesbury v. Smith*, 2. Burr. 924. *Rushton v. Aspinall*, Dougl. 680.

ANOTHER

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ANOTHER EXCEPTION was taken, that the action is brought in a wrong county; for it should be brought where the trenches were dug. If the cause of action arise in two count the action may be brought in either.

But by HOLT, *Chief Justice*, and the rest of THE COURT, it is good; for here is cause of action that arises in both counties, and the action may be brought in either (a). If there is a conspiracy in one county, and an indictment in another, the action may be brought in either. But if a nuisance be erected in one county to the damage of a man in another, the assise must be brought in *confinio comitatum*. 7. Co. 2. Dyer, 38. * [258]

Then MR. PENGELLY took another exception, that the offence was not laid with a *continuando*; but it was, that the ditches were dug such a day, and his close damaged, &c. *diversis diebus et vicibus*, between such a time and such a time; and cited *Hambleton v. Vere* (b).

Which HOLT, *Chief Justice*, said was not like this case.

(a) See *Patterson v. Scott*, Stra. 776. *Scott qui tam v. Brett*, 2. Term Rep. 238.

(b) 1. Lev. 299. 2. Saund. 196.

Joddrell against Heathcot.

Case 322.

IN DEBT FOR RENT, the defendant declared, "*quod cum per quandam indenturam factam, &c. mentionatum existit*," that the plaintiff did demise, &c. to the defendant, &c. The defendant pleaded an ill plea. To which the plaintiff demurred, and afterwards pleaded over. Declaration in debt for rent, on a demise by mentionat. existit, is ill.

THE COUNSEL for the defendant took exception to the declaration, that "*mentionat. existit*" is ill in this case.

RAYMOND, to maintain the declaration, cited *Cooker v. Child* (a), where "*testatum existit*" is held well in debt. Also he said, that though it was ill upon a special demurrer, yet it is helped by their pleading over.

PENGELLY for the defendant said, that the case of *Cooker v. Child* is debt upon a charter-party, which is the same as covenant, which is agreed on all hands to be well; and in the same case, 3. *Keb.* 94. the difference is taken, and there held, that laying a demise by way of "*testatum existit*," is ill; he cited likewise *Lutw.* 534; 5. 2. Saund. 319.

And as to the second exception, that it was helped by the plea, he said, that the plea could not admit more than was well alledged; and that declaring in trespass with a *quod cum* is ill; he cited 2. *Lev.* 193. 206. 2. *Jones*, 218. 197.

(a) 2. Lev. 74.

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JODDRELL
against
HEATHCOT.

POWELL, *Justice*, held the declaration ill; for the demise must be alledged so certainly as that it may be traversed. He said, it had been held well in covenant, because the precedents are so; and as to the case of *Cooker v. Child*, of debt upon a charter party, that is the same as covenant; and declaring in trespass by a *quod cum*, has always been held ill.

* [259]
Discontinuance.

* THE COUNSEL for the plaintiff, seeing the opinion of the Court against them, prayed leave to *discontinue*; which was granted upon payment of costs.

Case 323.

The Queen against The Parish of St. Giles.

An appeal against a poor-rate must be to the next sessions after the allowance of the rate.

S. C. 1. Bott.
222. pl. 225.

THE INHABITANTS of the parish of *St. Giles* appealed to THE SESSIONS upon an order made for the levying a poor's rate, in which some were unequally taxed; upon which the sessions dismissed the appeal, and shewed for cause in the order of dismissal, "That the court being of opinion that the appeal should have been to the next quarter-sessions after the making the rate, and not after the taking the distress; therefore the court does dismiss the appeal." And this order being removed into the court of king's bench by *certiorari*,

MR. EYRE, *Solicitor General*, SIR THOMAS PARKER, and MR. WHITACRE, argued for confirming the order of sessions for dismissal of the appeal, that though 43. *Eliz. c. 2.* does not say, that the order shall be to the next quarter-sessions, yet it is necessary so to be, for else it will create confusion, no time being limited by the act; for if not the first, it cannot be brought in any certain time; that this is not an appeal for relief, but to quash the rate, which should be before any payment upon it, or distress for it; for if the rate be not good, an action lies against the overseers for taking the distress.

SIR EDWARD NORTHEY and MR. RAYMOND *contra*. That it is not necessary the appeal should be to the next quarter-sessions, for there is no time limited by the act; and that being alledged for the reason of the order of dismissal, it is bad. Besides, this appeal was at the next quarter sessions after the grievance.

HOLT, *Chief Justice*, POWELL, POWYS, and GOULD, *Justices*. This appeal need not be to the next quarter-sessions (a); but the

(a) By 17. *Geo. 2. c. 38. s. 4.* "Any person aggrieved by any rate made for the relief of the poor, or who shall have any material objection to any person being put on or left out of such rate, or to the sum charged on any person, shall and may, giving reasonable notice, appeal to the next general or quarter sessions." And it is now settled, that the appeal must be to the next sessions, *Rex v. Canterbury*, 4. *Burr.*

2290. in all cases, *Rex v. Coode*, 1. *Const's Poor Laws*, 236. pl. 240. and it must be to the next sessions after the publication of the rate; for it is by making the rate that the party is aggrieved, *Rex v. Micklesfield*, *Const's Poor Laws*, 1. vol. p. 239. pl. 241. and the publication shall be from the time it is allowed by the justices, *Rex v. Atkins*, 4. *Term Rep.* 12.

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error of the justices is, that they did not proceed upon it when it was before them, and give judgment whether the rate was good or not (a). Though one of the parties * may have a particular appeal, yet this being a rate, which they think not according to the act, they may appeal together (b).

THE QUEEN
against
THE PARISH
OF
ST. GILES.

* [260]

But it being assigned for a reason, that the appeal was not to the next quarter-sessions, THE COURT quashed the order of dismissal.

(a) See 17. Geo. 2. c. 38. s. 6. and Mr. Conft's Bott. 1. vol. 229 to 231. how far the sessions may give relief on appeals from a poor's-rate.

(b) So also the parishioners, as well as the particular persons appointed, may appeal against an appointment of overseers, Rex v. Forrest, 3. Term Rep. 38.

Gately against Gillingham.

Case 324.

CASE by original upon a promissory note; judgment by default, and a writ of enquiry tested the eighth of November, returnable *Ostabis Martini*.

In actions by original there must be fifteen days between the teste and the return both of writs and process.

WHITACRE moved in arrest of judgment, for that there was not fifteen days between the teste and the return of the writ of enquiry; for in all judicial writs, where you proceed by original, there must be fifteen days between the teste and the return, not only in the writ but also in the subsequent process.

And accordingly THE COURT (HOLT, Chief Justice, absente) inclined that it was ill.

Sed adjournatur.

Bull against Clifton.

Case 325.

SIR EDWARD NORTHEY moved, that the plaintiff in error might put in special bail.

No special bail in error on a bottomree bond. Ante, 2.

This was an action upon the case on a *bottomree bond*, to pay money on a contingency. The condition of the bond was, "that if the ship or vessel called the *Oley Frigate*, &c. shall with all speed sail from the river of *Thames* to *China*, &c. without deviation and return to the river within thirty-six kalendar months, hazard of the sea excepted; and if the said *J. S.* shall within the said thirty-six kalendar months, or thirty days after the arrival of the said ship, pay, &c. to *J. S.* then the obligation to be void."

HOLT, Chief Justice, said, this is not a bond only for the payment of money, for if he do not go the voyage he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions; and he inclined, that it did not require special bail (a).

Sed adjournatur.

(a) See the statute 3. Jac. 1. c. 8. Anonymous, ante, 2. Garnet v. Dandy, 1. Show. 15. Pitt v. Carey, 1. Stra. 476. Scott v. Brace, 6. Mod. 38. Thrale v.

Vaughan, 2. Stra. 1190. Chauvet and Another v. Alfray, 2. Burr. 740. Desbordes v. Horley, 2. Sua. 959.

* [261] Michaelmas Term, 8. Queen Anne, In B. R.

Case 326.

* The Queen against Dr. Wall.

A parish-clerk is not removeable without cause. Ante, 221.

HOLT, *Chief Justice*, said, that if a parish-priest put in a clerk, he cannot turn him out at pleasure; for he is then the clerk of the parish, and not the parson's clerk only (a).

(a) See Kidd v. Watkinson, ante, end v. Thorpe, Stra. 776. S. C. 2. Ld. 221. Jermyn's Case, Cro. Jac. 670. Ray. 1507. Peake v. Bourne, 2. Stra. Peat qui tam v. Birr, Fitzg. 272. Towns- 942. Parker v. Clarke, 6. Mod. 252.

Case 327.

The Queen against Mickal.

The Court will not grant a *habeas corpus* to bail a person charged with larceny.

A MOTION was made for a *habeas corpus* to bring up the body of the defendant, charged with picking a pocket; and offered to bring unexceptionable bail; and to send a down a tipstaff to enquire of his reputation.

HOLT, *Chief Justice*. Though we have a discretionary power, yet it being certified (sworn) that he was charged with the fact, I think we ought to refuse to bail him:

Which (on consulting his companions) he accordingly did.

AT
THE SITTINGS

AFTER

MICHAELMAS TERM,

The Eighth of Queen Anne,

AT

Guildhall,

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

The Court of Queen's Bench.

Theobald *against* Tregott.

Case 328.

IN AN ACTION ON THE CASE by a silk-dyer against his servant for money received to his use;

A creditor, who pays money to his debtor's servant, is not a competent witness to prove such payment in an action by the master against the servant.

Upon the evidence it appeared, that *A.* sending silk to be dyed by the plaintiff, the plaintiff sent his servant, the defendant, home with it, and *A.* paid him for every parcel as he received it: *A.* was produced as a witness that he paid the money to the defendant.

But *HOLT, Chief Justice*, would not admit his evidence; for that would be to admit a creditor to swear in discharge of himself. He said, that if a man pay money by his * servant, the servant may be a witness; but that is allowed for the necessity of the thing.

* [262]

Taylor

Michaelmas Term, 8. Queen Anne, In B. R.

Case 329.

Taylor against ———.

One not a witness may evidence a lease, &c.

HOLT, *Chief Justice*, said, that a person who has not set his hand to the witnessing a lease, may be a witness to it, if those who signed it do not appear; and so he ruled it; for in the case of a lease of years, it is sufficient if the lessor only sign in the witnesses presence. And so it seems in other grants of chattels. *Quære*, if so of freeholds, &c.

Case 330.

Anonymous.

Writ of enquiry.

AND IT WAS ALSO said by him, that though defence be made upon a writ of enquiry, yet it would not aid a judgment if irregularly obtained.

HILARY

HILARY TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir James Mountague, Knt. Attorney General.

Sir Robert Eyre, Knt. Solicitor General.

* Memorandum.

* [263]

Case 331.

HOLT, *Chief Justice*, being sick, could not attend this Term, except one day, which was *Thursday*, the ninth of *February*.

Bishop *against* Eagle.

Case 332.

THE PLAINTIFF declared upon a prohibition; and upon demurrer to the declaration,

The difference where you proceed in prohibition for damages, and when to maintain the jurisdiction of the common-law courts, S. C. ante, 186, S. C. 10. Mod.

SALKELD took exception to it, because the declaration set forth, that the defendant sued in the spiritual court, *post regiam prohibitionem ei prius inde in contrarium direct.* but does not say "*deliberat.*;" and here appears no cause of action, since it is not set forth that the prohibition was delivered.

This matter was moved last Term;

And this Term THE COURT was of opinion, HOLT, *Chief Justice*, being absent, that when you proceed for damages, then it must be set forth, that the prohibition was *delivered*, and also a *venue* laid; but that in this case, which is only to maintain the jurisdiction of this court, it is not necessary.

Foster

Case 333.

Foster against Burden.

Venue cannot be changed in *scire facias* upon judgment in ejectment.

S. C. post. 274.

* [264]

THE CASE was this: Judgment was given in ejectment upon a demise of three years; the defendant brought a writ of error in the court of king's bench, and the defendant in error sued out a *scire facias quare executionem non*; to which the plaintiff in error pleaded, that he had paid two hundred pounds in satisfaction of the term and damages; and upon issue joined,

CHESSHIRE, *Serjeant*, moved to change the venue out of *Yorkshire* into *Middlesex*.

But THE COURT denied the motion, because the ejectment is local; and the *scire facias* being grounded thereon, the venue could not be changed (a).

(a) That the venue cannot be changed Jones, 33. 1. Salk. 80. 3. Mod. 336. in local actions, see Latch, 197. 2. Lev. 6. Mod. 194. 80. 3. Keb. 135. Carth. 182. W.

Case 334.

Todd and his Wife against Redford.

A declaration in an action of assault and battery by husband and wife, stating that the defendant, on such a day, drove a coach over the wife and bruised her, by reason whereof the husband laid out divers sums of money for her cure, et alia enormia ipsi intulit ad grave damnum ipsorum, is good, though entire damages be given; for the per quod is only laid in aggravation and the alia enormia too general to suppose damages given for it.

Cro. Jac. 123.
2. Salk. 642.
1. Show. 180.
3. Bac. Abr. 306.

ACTION OF ASSAULT AND BATTERY is brought by the husband and wife.

The declaration set forth, that the defendant on such a day, &c. assaulted *Eleanor* the wife, and driving a coach over her, bruised her, &c. et ratione inde, the husband laid out *diversas denar. summas* for the cure, &c. et alia enormia ipsi intulit ad grave damnum ipsorum.

The defendant pleaded in abatement, that his name was *Redburn* and not *Redford*:

And on issue, and verdict for the plaintiff,

GROVE, *Serjeant*, in arrest of judgment, moved, that in this case the husband and wife should not have joined, because the damage is laid to be for the money laid out in cure of the wife as well as for the battery, and intire damages being given, it is bad for the whole; and cited 1. Sid. 328. Yelv. 106. 2. Vent. 29. 2. Cro. 625. 1. Lev. 3. but the husband should have sued alone for the money laid out in the cure.

RAYMOND for the plaintiff said, he agreed, that the cases cited by GROVE were so; but that they are all in actions of assaults committed by husband and wife, and in this case the tort is only upon the wife, and the ratione inde, &c. is only consequential damage; and so was it held in the case of *Russell v. Corn* (a), in assault and bat-

(a) 1. Salk. 119. S. C. 6. Mod. 127. S. C. Holt, 699. S. C. 2. Ld. Ray. 1031.
tury

Hilary Term, 8. Queen Anne, In B. R.

tery brought by husband and wife, *per quod negotia* of the husband *remanerunt infecta*; for there judgment was given for the plaintiff because they held the *per quod* only consequential damage, which is a case in point; and the *alia enormia* is not certain enough * to have damages, and therefore it is never considered by a jury.

TODD
AND HIS WIFE
against
REDFORD.

* [265]

POWELL, *Justice*, said, that where husband and wife join in an action of assault and battery for beating both, it is wrong; but it may be helped by a verdict, separating the damages; and here the *git* of the action is only the beating of the wife (*a*), and the *ratione inde* is only in aggravation of damages (*b*). As to the *alia enormia*, it is too general to suppose damages given for it. He said also, that husband and wife cannot join in assault and battery, *per quod consortium amisit*, for the *per quod* in such case is the *git* of the action; and in the case at bar, if the *ratione inde* had been left out, the surgeon's bill might have been given in evidence, in aggravation of damages.

Judgment was given for the plaintiff; HOLT, *Chief Justice*, *absente*.

(*a*) Yelv. 89. 1. Brownl. 205. (b) Smith v. Hexton, Stra. 977.
1. Roll. Rep. 360. Cro. Jac. 501. 533. Dix v. Brookes, Stra. 61. Read v.
Cro. Car. 90. Marshal, 8. Mod. 26.

Anonymous.

Case 335.

IF a *mandamus*, *alias*, and *pluries* be issued, a return in strictness ought to be to the *pluries*; because the party is in some sort of contempt for disobeying the first two writs; yet if there be no damage to the party, a return to the original *mandamus* may be filed.

Mandamus.
Return.

The Queen against The Parish of Kidderminster.

Case 336.

MR. BAINS moved to quash an order of removal. The order was directed "To the overseers and churchwardens of the parish of Kidderminster," and set forth, "that WHEREAS complaint has been made by you," but does not say whom.

An order of removal directed to A. saying, "Whereas complaint has been made by you," is good.

PER CURIAM. It is well; because it refers to the persons before-mentioned (*a*).

A SECOND EXCEPTION was, that there is no adjudication.

"It appears to us, &c." is a good adjudication in an order of removal.

Upon reading the order, it appeared, that as to the place of his last legal settlement, there was a good adjudication, by saying, "It appears to us, &c." But saying, "He is likely to become

(*a*) See Weston Rivers v. St. Peter's, John Baptist, Foley, 267. Horsham v. 2. Salk. 492. S. C. 5. Mod. 149. S. C. Henfield, Burr. S. C. 24. Rex v. 12. Mod. 89. Shagford v. North Bovey, Hately, Andr. 361. Great Bedwin v. Sett. and Rem. 33. Spalding v. St. Wilcox, 2. Stra. 1158.

"chargeable,"

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THE QUEEN "chargeable," is no adjudication, without saying, "It appears to
against "us, &c."

THE PARISH
OF
KIDDERMIN-
STER.

And upon this last exception this order was quashed (a).

(a) See *Rex v. Hackney*, Salk. 478. *Reg. v. Rochville*, Sett. & Rem. 21.
Suddlecombe v. Burwash, 2. Salk. 491. *Tully v. Willerton*, 1. Stra. 77. *Rex*
Malden v. Fletwick, Salk. 530. *Reg. v. Warnhill*, 2. Sess Cases, 97. *Usculm*
v. Middleham, Foley, 271. *Reg. v. v. Clifthydon*, Burr. S. C. 138.
Waltham Magna, Sett. & Rem. 38.

* [266]

Cafe 337.

* Anonymous.

An order of two
justices must
show the county
in which it was
made.

MR. PENGELLY moved to quash an order made by two justices.

His EXCEPTION was, that it does not appear that they were justices for that county; for it is set forth to be made by *A.* and *B.* two justices of the county *aforsaid*, and there was no county in the body of the order for the word *aforsaid* to refer to, and it shall not refer to the county in the margin:

Whereupon it was quashed PER CURIAM (a).

(a) If an order of removal be directed to the officers of two parishes in different counties, and the justices are stated to be "justices for the county *aforsaid*," it is bad for uncertainty, *Rex v. Stepney*, Burr. S. C. 23. *S. P. Rex v. Graham*, Cases C. L. 82. But it is settled, that if the county be named in the margin of an order it is sufficient, for the margin of an order is part of the order itself, *Rex v. Township of Helbeck*, Burr. S. C. 198. *S. P. Usculm v. Clifthydon*, Burr. S. C. 138.

Cafe 338.

The Queen *against* Cecill.

The 5. *Eliz. c. 4.*
extends to cove-
nant servants, if
in husbandry.

MR. GILBERT moved to quash an order of sessions, made upon the master to pay seven pounds to *J. S.* his servant in husbandry.

THE FIRST OBJECTION was, that *J. S.* was a *covenant servant*, and the statute 5. *Eliz. c. 4. s. 15.* does not extend to such, though in husbandry.

POWELL, Justice, held, that the statute 5. *Eliz. c. 4.* having a favourable construction has been extended to covenant servants, if in husbandry.

Justices cannot
make an order
on 5. *Eliz. c. 4.*
to pay servants
wages on the
oath of the ser-
vant.—But see
note at the end
of the case.

THE SECOND OBJECTION was, that the order appears to be made upon the oath of *J. S.* the servant, which is contrary to the rule of evidence, that the servant's oath should be taken in his own cause; and as to its being set forth, that it is upon hearing of Counsel, that does not alter the case. Besides, there may be other evidence; for though perhaps others cannot prove the contract, yet they may prove the service.

LUTWYCH

Hilary Term, 8. Queen Anne, In B. R.

LUTWYCH *contra*. This is not to be bound by that rule; for here is a power given by an act of parliament, for the benefit of poor servants. Besides, it does not appear that there was other evidence, and here is an adjudication that so much is due. This is done every day, on orders for the settlement of poor people, upon the party's single oath.

THE QUEEN
against
CECIL.

RAYMOND in answer to *Lutwych*. This is not like the case of settlements, for it is indifferent to the party where he is settled.

* **POWELL**, *Justice*, as to this second objection said, that he would not take it, that there was other evidence; that he believed the wages were certain in most counties, and the way is to examine the time of service by others, and the justices to adjust the *quantum*. We allow a man to be a witness in his own cause for necessity, as on the statute of HUE AND CRY; but here may be other evidence.

* [267]

NOTA, The justices at sessions are to appoint statute wages.

But it was quashed, **HOLT**, *Chief Justice*, absent, upon the second exception (a).

(a) But see 20. Geo. 2. c. 19. by which in the cases within the act, the justices are empowered to examine the servant upon oath, and make an order thereon for the payment of wages; and by

31. Geo. 2. c. 11. f. 3. this power is extended to the cases of all servants in husbandry, though hired for less time than a year.

The Parish of St. Saviour's Southwark *against* The Case 339.
Parish of Cripplegate.

BONNICK moved to quash an order of sessions, made to remove a child of three years old to the place of its birth (a).

THE EXCEPTION was, that it should have been sent to the place where the father was settled; because the settlement of the father is the settlement of the child (b).

NORTHEY to maintain the order said, that it had been often adjudged, that the place of birth is a settlement, and good until the settlement of the father is found out; and it is possible the father might have no settlement, as if he was an *Irishman*, or an *alien*, and has got no settlement here; in which cases, the place of birth is the settlement of the child (c).

The removal of a child of three years old to the place of its birth is good; but it may be removed from thence to the parish in which its father was last legally settled.

S. C. Foley, 305.

POWELL, *Justice*. The place of birth is the settlement of a bastard-child; but a legitimate child is part of the father's family,

(a) *Quere*, If it ought not to have been adjudged, that the settlement of its parents was unknown, *Case of Christ's Hospital*, 2. Salk. 485. But see *Rex v. Woodford*, 2. Const's P. L. 16. *Rex v. Whitley*, 2. Const's P. L. 17.

6. Term Rep. 56.; *Rex v. St. Mary, Cardigan*, 6. Term Rep. 116.

(c) *Coured's Case*, Sett & Rem. 201. *Rex v. St. Paul, Shadwell*, 2. Const's P. L. 32. *Tynton v. Morton*, 2. Const's P. L. 33. *St. Giles v. St. Margaret's*, Foley, 287.

and

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THE PARISH
OF
ST. SAVIOUR'S
SOUTHWARK
against
THE PARISH
OF
CRIPPLEGATE

* [268]

and must be settled with him ; but if the father's settlement cannot be found, then the place of its birth is its settlement (a). Therefore if a child be dropped in the parish of *A.* and that parish cannot find the settlement of the father, they shall send it to the place of its birth, and that place must find out the father's settlement, or keep the child (b). As to the case of nurse children, it has always been holden, that children under seven years shall go along with the mother ; therefore if a man settled in the parish of *A.* marry a widow in the parish of *B.* who * has divers children under seven years, and settled in the parish of *B.* the children shall go along with the mother to the parish of *A.* ; but this is only for nurture, and they shall gain no settlement ; but the parish of *B.* shall take them again when above the age of seven years ; and if they become chargeable, the parish of *B.* shall pay for their keeping, though they still remain with the mother (c).

To which POWYS and GOULD, *Justices*, agreed :

So the order was affirmed ; HOLT, *Chief Justice*, *absente*.

(a) *Cunmer v. Milton*, 6. Mod. 87.
Whitechapel v. Stepney, Carth. 433.

(c) See *Rex v. Bucklebury*, 1. Term Rep. 164.

(b) *Whitechapel v. Stepney*, Carth. 433. 2. Const's P. L. 1.

Cafe 340. The Parish of Binfield *against* The Parish of Banstead.

An order of removal directed to the officers of two parishes, without saying it is to remove and which to receive, is bad.

EYRE, *Solicitor General*, moved to quash an order of removal made by two justices.

THE FIRST EXCEPTION was, that it was wrong directed ; for it was directed " To the churchwardens, &c. of *Binfield*, AND to the churchwardens, &c. of *Banstead*, and whom it may concern." And it is not said who to convey or who to receive.

THE COURT seemed to incline, that it ought to be quashed.

Sed adjournatur (a).

(a) *Bedwick's Case*, Comb. 325. *St. George's v. St. Olave's*, 2. Salk. 493.

Cafe 341.

The Queen *against* Davison.

An order cannot be made to compel the husband to allow to the

A N order of two justices to compel *Davison* to allow so much a week for the maintenance of his wife and family (a).

to allow to the maintenance of his wife and family while resident with them.

(a) By 43. *Eliz. c. 2. s. 7.* " the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other person not able to work, being of sufficient ability,

" shall maintain every such poor person, according to the rate as shall be assessed by the justices of the county at their general quarter sessions, on pain of forfeiting twenty shillings a month."

MR.

Hilary Term, 8. Queen Anne, In B. R.

MR. NOTT moved to quash the order, for that *the justices* have not jurisdiction in this case (*a*), it being properly *alimony*, and belonging to the spiritual court.

THE QUEEN
against
DAVIDSON.

And (HOLT, *Chief Justice*, being absent) POWELL, *Justice*, said, that the justices have no jurisdiction in this case, but this is not *alimony*. If a man run away from his family, he may be punished as a rogue and a sturdy beggar (*b*); but whilst he continues resident, they cannot charge him in this manner:

And the order was quashed.

(*a*) Rex v. Reve, 2. Bullst. 344. Rex v. Humfries, Stiles, 154. Rex v. Charnock, Comb. 418. 5. Geo. 1. c. 8. 17. Geo. 2. c. 5. The Soldier's Case, 1. Wils. 331. 1. Const's edition of Bott's Poor Laws, 331 to 337.

(*b*) See the statutes 7. Jac. 1. c. 4. f. 8.

* [269]

* The Parish of St. Benedict against The Parish of St. Peter's in Norwich. Case 342.

SIR JAMES MOUNTAGUE, *Attorney-General*, moved to quash an order of two justices of the peace for the county of the city of *Norwich*, made upon the statute 43. *Eliz. c. 2.* which enacts, "That if any parish is not able to maintain its poor, then two justices may tax other parishes and places, and the whole hundred also if need requires; and where the hundred is not able, justices in sessions may tax the county in part or wholly at their discretions."

In an order made by two justices to tax parishes in aid, it must appear that the parishes taxed are within the hundred; and therefore if it only states them to be within the county it is bad; for by 43. *Eliz. c. 2.* it is the sessions only that can tax the county, if the hundred is unable to afford relief.

THE EXCEPTION to the order was, that it does not appear that the parishes taxed are within *the hundred*; for it is only said, that they are within *the county* of the city of *Norwich*; and two justices by the act have not power to tax *the county*, but only *the hundred*, or the parishes within the hundred.

SIR EDWARD NORTHEY *contra*. If two justices cannot relieve in this case, there can be no relief given; for it is well known there are no hundreds within cities, and the city and the county of the city are the same (*a*). Indeed *London* has wards which resemble hundreds, but no other city; and the power given to the justices in sessions must arise upon a defect in the hundred; and where there is no hundred, there can be no such defect: the sessions could have made no order in this case.

Show. 42.

MR. RAYMOND, on the same side with SIR EDWARD NORTHEY. The question is, Whether a city is within the statute? for the

(*a*) And there being no hundreds in the city, the two justices of course could not make the order, S. C. Foley, 43. But it seems if any division be called by any name synonymous or equivalent to that of a *hundred*, as a *tribing*, it is equally within the jurisdiction of the two justices,

Rex v. Milland, 1. Burr. 576. but county justices cannot rate a parish within their jurisdiction, in aid of another parish lying within a borough, which has an exclusive jurisdiction, Rex v. Holbeach, 4. Term Rep. 778.

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THE PARISH
OF
ST. BENEDICT
against
THE PARISH
OF
ST. PETER'S
IN NORWICH.

sessions jurisdiction arises only upon the insufficiency of the hundred (a). This statute is only a directory and remedial law; and as in the case of the statute of HUE AND CRY, which directs, that oath shall be made before a justice of the hundred where the felony was committed, yet this may be to the next justice, though not of the hundred (b).

* [270]

* POWELL, *Justice*. This is not *casus omisus* out of the statute; and though the TWO JUSTICES have not power, here being no hundred, yet THE SESSIONS have a jurisdiction, and may tax the county of the city in part or at large.

To which the rest agreed, and (HOLT, *Chief Justice*, being absent),

The order was quashed, because it was made by two justices only.

(a) But it is not necessary that two justices should adjudge the hundred incapable, in order to give the sessions jurisdiction to rate the county in aid, *Rex v.*

Percival, 1. Stra. 56. S. C. Foley, 45. S. C. 1. Sess. Cases, 120.

(b) Jones, 239. Cro. Car. 211.

Case 343.

Anonymous.

Motion to bring money into court.

IN AN ACTION brought upon a policy of insurance,

PENGELLY moved for leave to bring fifteen pounds into court, being as much as they thought their average of the damage came to (the goods not being lost, but only damaged); and so the plaintiff to proceed upon peril of costs.

POWELL, *Justice*. The motion cannot be granted, though we have granted it in a *quantum meruit* (a), and also in covenant for payment of money (b). But in covenant for repairs we have denied it (c); and so we must here (d).

(a) 1. Vent. 356. 2. Salk. 596.

(b) 1. Wils. 75. 2. Burr. 1120. Barnes, 284.

(c) B. R. H. 173. 2. Stra. 890.

(d) But now by 19. Geo. 2. c. 37. s. 7.

"any person sued in any action of debt,

"covenant, or any other action, on any

"policy of assurance, may bring into court

"any sum or sums of money, and if the

"plaintiff shall refuse to accept it with

"costs taxed in full discharge, and the

"jury shall not assess above the sum,

"the plaintiff shall pay the costs."

3. Burr. 1773.

Case 344.

The Queen against Lane.

A return to a *mandamus*, to restore a capital burghers, "that he wrote a libel to one of the aldermen,"

"and thereupon consented to be turned out," is bad; for a common council cannot try a libel, and a resignation by *parol* must be certain.—S. C. Fort. 275. S. C. 2. Ld. Ray. 1304. Kyd on Costs, 379.

A MANDAMUS directed to the corporation of Gloucester, to restore Lane to the place of a capital burghers: they return, that Lane wrote a certain scandalous letter to one of the aldermen, amounting to a libel; and being charged therewith at a court held, &c. he consented to be turned out.

PER

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PER CURIAM, The common council are not judges of a libel; for that is only triable at common-law. And suppose it be a libel, he should be convicted of it at common-law before it can be alleged as a cause of removal; and as to his resignation, if they had designed it to be a cause of removal, it should have been returned otherwise; for here they summoned him to shew cause why he should not be turned out for writing a libel; and he appears and says, "You may turn me out if you will; but I will bring a *mandamus*," and so he does. This certainly is no resignation, though a resignation may be by parol, according to *Sir Jonathan Jennings's Case (a)*; * but then it ought to have been returned more certain and solemn.

THE QUEEN
against
LANE.

* [271]

So THE COURT granted a *peremptory mandamus*, HOLT, Chief Justice, absent.

(a) *Rex v. Mayor of Rippon*, 1. *Ld. Ray.* 563. *S. C. Salk.* 433.

The Queen against Shepherd.

Case 345.

MR. RAYMOND moved to amend a faulty inquisition of a *felo de se*; not saying "*super visum corporis*." He said this is like the case of a caption of an indictment, which may be amended; and cited 1. *Sid.* 225. 229.

A coroner's inquisition can only be amended in matter of form.

SIR EDWARD NORTHEY *contra*. The farthest they can go is to amend the caption of an indictment. But it was settled in the case of *The Queen v. Burdy (a)*, that an inquisition cannot be amended.

POWELL, Justice. The coroner can amend only matter of form.

NOTA, Some other exceptions were taken:

FIRST, That it is said to be taken "*coram coronatoribus dom. reg.*" but does not say for what place.

SECONDLY, That it is said, "*per sacramentum duodecim virorum A. B. C.*" without *proborum et legalium hominum*, nor for what place.

MR. RAYMOND, seeing the Court was against him, moved to quash the *certiorari*:

A *certiorari* to remove an inquisition, stating it to have been lately taken, is good.

FIRST, Because it sets forth, that there was an inquisition *nuper capt.* and the common form is only *capt.*

SECONDLY, And it appears upon the return to be taken after the *teste* of the *certiorari*, for that is the twenty-eighth of November 8. *Annæ Reginae*, and the inquisition is the fourth of January, and it being *nuper capt.* shall tie it down to an inquisition taken before.

(a) 7. *Queen Anne*.

Hilary Term, 8. Queen Anne, In B. R.

THE QUEEN
against
SHEPHERD.

SIR EDWARD NORTHEY *contra*. The *certiorari* is well, as writs of error may be taken out before any judgment given, and yet well.

POWELL, *Justice* (HOLT, *Chief Justice*, absent). *Capt.* and *nuper capt.* are the same in this case. It is usual to take out *certiorari*'s before the inquisition is found, as a writ of error may be taken out as soon as the action commences. 2.

Coroner's inquisition must be *super visum corporis*.

Then MR. RAYMOND desired to have a *melius inquirend.*

But PER CUR. It is usual to grant one in this case; for the inquisition must be *super visum corporis*.

* [272]

Let the inquisition be quashed; and if you will have a *melius inquirend.* * it must be upon another motion, and not grafted upon this.

Case 346.

Hern against Dryden.

An award that one of the parties should make an assignment of his apprentice, is bad.

DEBT upon an arbitration-bond. The award was, that the defendant should make an assignment sufficient in law of J. S. his apprentice, to the plaintiff:

And IT WAS RESOLVED BY THE COURT, *viz.* POWELL, POWYS, and GOULD, *Justices* (HOLT, *Chief Justice*, absent), that the award was ill; because the assignment could not be without the assent of the apprentice; and an award for a man to do a thing which is not in his power to do, without the consent or concurrence of another, is void (a).

POWELL, *Justice*, said, that by the *custom of London*, if a master leave off trade, he may assign over his apprentice, but then the apprentice may chuse his master (b); but such assignment will not hold in any other place.

(a) See Godb. 12. Bedam v. Clarkson, 1. Ld. Ray. 123. Kyd on Awards, 104, 105.

(b) Dalton, c. 58. Rex v. Peck, 1. Salk. 66. Caistor v. Eccles, 1. Ld.

Ray. 683. S. C. Salk. 68. The Parish of Holy Trinity v. The Parish of Shore-ditch, Stra. 10. Baxter v. Burfield, 1. Const's Poor Laws, 523.

Case 347.

Anonymous.

Bailiffs of liberties and sheriffs, what punishment for not returning writs.

IT was held by POWELL, *Justice*, POWYS and GOULD, *Justices*, assenting (HOLT, *Chief Justice*, absent), that this Court cannot amerce bailiffs of liberties for not returning of writs, &c. But the Court can make a rule for them to make a return, and for disobeying that, bring them into contempt; but sheriffs, and all that are officers of the court, the Court can amerce. Lately indeed we did amerce the bailiff of *Westminster*; but that was wrong.

Anonymous.

Hilary Term, 8. Queen Anne, In B. R.

Anonymous.

Case 348.

ON A MOTION to set aside an execution, executed after a writ of error allowed;

THE COURT held, that though there was no notice given to the plaintiff's attorney of the allowance of the writ of error, yet it was * a *superseas* to the execution: But to bring the attorney into contempt, he must have had notice.

Motion granted (a).

Execution executed after a writ of error allowed, though without notice, is *superseas*, but notice is necessary to bring the party into contempt.

* [273]

- (a) Hannott v. Farettes, Bar. K. B. 376. Purkins v. Woollaston, 1. Salk. 321. Spratt v. Frederick, Sayer Rep. 51. Capron v. Archer, 1. Burr. 340. Jaques v. Nixon, 1. Term Rep. 279. Parry v. Campbell, 3. Term Rep. 390. See also Tidd's Practice, 714, 715. Sellon's Practice, 579.

The Queen against Depuke.

Case 349.

MR. RAYMOND moved to quash an indictment of forcible entry; which sets forth, that the defendant entered forcibly into the closes of J. S. and turned him out, whereas before the time J. S. *possessionatus fuisse de termino ult. elaps.*

His exception was, that the estate of J. S. should have been particularly set forth, for he might have been *tenant at sufferance*; and it has been often adjudged, that *tenant at sufferance* is not within the statute of Forcible Entries.

LIKEWISE he said, that by the word "*fuisse*," it does not appear, but that the estate of J. S. was determined before the entry.

ERGO quashed PER CURIAM.

HOLT, Chief Justice, *absente*.

An indictment of forcible entry must shew the kind of estate of which the party was possessed.

2. Roll. Abr. 80. Yelv. 165. 1. Vent. 106. 1. Sid. 102. Salk. 260. 1. Mod. 73. 7. Mod. 123. 2. Hawk. P. C. ch. 64. s. 38.

The Queen against Brown.

Case 350.

THE DEFENDANT was indicted for not repairing a highway. He pleaded, that the inhabitants of D. ought to repair it; ABSQUE HOC, that he ought; whereupon issue being joined, the defendant offered to give in evidence, that it was not a highway.

But the verdict being against him, and that point saved, at the assizes of York, for the opinion of this Court;

This Term it was resolved by POWELL, POWYS and GOULD, Justices, upon the motion of LUTWYCH, that this ought not to have been given in evidence; because the defendant had confessed it to be a highway by his plea: for if he would have contested that point, he should have pleaded "not guilty."

To an indictment for not repairing a highway, a plea that the inhabitants of a particular district ought to repair it, is an admission that the way is a highway.

Case 351.

Leuknor against Plant.

Declaration in case against a common carrier held good after verdict, although the breach of the agreement was not precisely stated.

CASE. The plaintiff declares, that the defendant *Sarah*, being a common carrier, and using to carry goods *pro mercede* between *Worcester* and *Litchfield*, * the plaintiff delivered to her a guinea, to carry and deliver to her son *Thomas*; and that *Sarah*, the defendant, in consideration of so much for carriage, promised the plaintiff *ALICE*, "*quod ipsa eadem SARA denar. præd. &c. salvo portaret, et eosdem eidem T. cum postea requisit. esset deliberaret, præd. tamen SARA non deliberasset licet eadem SARA sapius per eandem ALICIAM requisit. fuit, sed ill. eidem ALICIE deliberare præfat. SARA omnino recusavit, &c.*" After verdict for the plaintiff,

IT WAS MOVED in arrest of judgment, and objected by MR. RAYMOND, that the declaration sets forth no breach of promise, for there is no request to pay to *Thomas*, to whom the money is to be delivered; and if no breach, then no cause of action: and though the plaintiff in this case might have countermanded the gift, any time before an action brought by *Thomas*, and consequently might have had an action for it against the defendant, yet that action must not have been *case*, but *trover* or *detinue*; and therefore here is no foundation for this special action, without shewing a request to deliver it to *Thomas*.

SED PER CURIAM, It being said generally, that she requested the defendant to deliver it, though not said to whom, and it being after verdict, they held it well; and gave judgment for the plaintiff;

HOLT *ægroto*.

Case 352.

Foster against Burdett.

The plaintiff cannot plead a sham plea to a *scire facias quare executionem non* on a writ of error.

S. C. ante, 263.

WRIT OF ERROR out of the court of common pleas. The defendant in error sues a *scire facias quare executionem non*, &c. to which the plaintiff pleads a sham plea in bar.

MASON moved, that the plea might be rejected:

And per POWELL, Justice, though the plaintiff may plead false pleas in bar, such pleas not being within the statute 4. & 5. Ann. c. 16. for the amendment of the law, so as to compel the party to make oath of the truth of his plea; yet since this *scire facias* is only to compel the plaintiff to assign errors, the Court will not suffer such pleas, whereby the defendant is delayed of his execution; for if such pleas are allowed, the Court cannot make a rule to assign errors until the plea be determined. * Therefore if upon two *nihilis*, or a *scire feci* returned, if the plaintiff do not come and assign errors, or plead a good plea to the *scire facias*, the Court will give rules to assign errors, or *nonpross* him upon the writ of error.

Hilary Term, 8. Queen Anne, In B. R.

This plea being rejected,

At another day in this Term the plaintiff assigned his errors, which appeared to be no errors; and since it was only for delay,

The Court will not reject an assignment of errors, though evidently for delay

THE COUNSEL for the defendant moved they might be rejected.

But his motion was denied PER CUR.; HOLT, Chief Justice, absent (a).

(a) It seems the Court intended to let the original plaintiff have his execution, for want of assigning errors.—NOTE to the former edition.

Ode against Young.

Case 353.

JUDGMENT in an inferior court reversed; because it was, "ideo consideratum est," and not said "per Cur." (a).

Judgment ideo considerat. and not per Cur.

(a) Anonymous, 1. Sid. 143. Smith v. Smith, 1. Sid. 147. Ventris v. Carter, 1. Yelv. 130. Peacock v. Bell, 1. Saund. 74. Atwood v. Burr, 1. Salk. 402. Walduch v. Cooper, 1. Wils. 16.

Bishop against Morgan.

Case 354.

DEBT UPON A BOND; and upon oyer the defendant demurred, and shewed for cause, that the bond was void, being "NOVENT UNIVERSI, &c. me J. S. teneri et firmiter obligari RICHARDO ——— de WOOD-STREET, &c. solvend. eidem RICHARDO BISHOP."

A bond is good although the surname of the obligee is omitted.

But THE COURT held the bond good; and gave judgment for the plaintiff (a).

(a) Langdon v. Goole, 3. Lev. 21. Lambert v. Branthwaite, 2. Stra. 945.

Anonymous.

Case 355.

MR. JENKINS moved for a special ac etiam in trespass, for lying with the plaintiff's wife, which was granted; and held the defendant to fifty pounds bail.

A defendant may be held to bail in crim. con.

N. B. Affidavits were produced of the indecent liberty they took together,

* [276]

* Riley against Adams.

Case 356.

DEBT UPON A BOND conditioned to perform covenants in an indenture, wherein the defendant being a parson covenanted to let the plaintiff enjoy the rectory, which the defendant as parson had demised to him. The defendant pleaded performance given in chancery, that he had resigned, is not sufficient to prove the fact without shewing that the bishop accepted the resignation.

On an issue whether a rector had resigned his benefice, the confession, in an answer, is not sufficient to prove the fact without shewing that the bishop accepted the resignation.

Hilary Term, 8. Queen Anne, In B. R.

RILEY
against
ADAMS.

nerally. The plaintiff replied, and shewed a breach, that the defendant resigned the benefice into the hands of the bishop, by which he could not hold the rectory. The defendant rejoined, that he did not resign; upon which issue is joined.

Upon the trial at *Guildhall*, before POWELL, *Justice*, the plaintiff gave in evidence the defendant's answer in chancery, wherein he confessed he signed a resignation, &c.

POWELL, *Justice*. This is not sufficient without also proving that the bishop accepted it;

And for want of such proof the plaintiff was nonsuited.

A bill in chancery, in the custody of one of the six clerks, may be read in evidence.

NOTE, Upon producing the bill in chancery, WHITACRE, *Serjeant*, objected, that it could not be read as evidence, not being taken off the file, but only from the custody of one of the six clerks.

But POWELL, *Justice*, said, it might be read (on swearing the six clerk), and so it had always been held.

Case 357.

Memorandum.

Death of HOLT, *Chief Justice*, and promotion of SIR T. PARKER.

SOON after the end of this Term the *Lord Chief Justice* HOLT died; and was in the following Term succeeded by Sir THOMAS PARKER, *Knight*, and *Serjeant at Law*; afterwards EARL OF MACCLESFIELD, and *Lord Chancellor of Great Britain*.

De quo dicendum est!

TRINITY

TRINITY TERM,

The Fourth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir Robert Eyre, *Knt.*

Sir John Fortescue Aland, *Knt.*

} *Justices.*

Nicholas Lechmere, *Esq. Attorney General.*

Sir William Thompson, *Knt. Solicitor General.*

Gough *against* Simpson.

Cafe 358.

KETTLEBY MOVED, that a pauper, before he had liberty to proceed to trial, should pay costs for not going on to trial; the defendant having obtained a rule for costs. In *2. Salk. 506.* it is said, that if a pauper give notice of trial, and do not go on, he shall be dispaupered; and it is within the reason of the case of executors paying costs for not going on to trial; and within the reasons of the statute of 23. *Hen. 8. c. 15.* which says, "if after appearance the plaintiff is nonsuited he shall pay costs." And in *Sider. 261.* it is said, that on nonsuits the costs must be taxed, and the plaintiff must pay them or suffer corporal punishment.

A pauper shall not pay costs for not going on to trial, until he is dispaupered.

*Stra. 983.
Fort. 320.
3. Wils. 24.*

DARNELL contra. Before the statute, the plaintiff in those actions there mentioned, and his pledges, were amerced, and no costs paid. The statute says, that after appearance and on nonsuit, the costs shall be paid in those actions, and a pauper suffer punishment. The case before us is not in the reason of that statute, for this is neither a nonsuit nor *quasi* one. The case in *Salkeld* is, that the plaintiff shall be dispaupered, but there is no mention made that he shall pay costs. This differs from the case of executors, for they are supposed to have money, and the pauper not to be presumed able

GOUGH
against
SIMPSON.

able to pay any. And this not being a nonsuit, it is not in the power of the Court to inflict any punishment.

MR. KETTLEBY. We have a rule for costs, and only move to have it paid before they go on to trial.

PRATT, *Chief Justice*. I remember this cause was put off purely by accident, and without any design of vexation by not going on to trial. There is no pretence that the construction of the statute of 23. Hen. 8. c. 15. can govern this case.

THE COURT. Discharge the rule for costs.

Cafe 359. The King against The Inhabitants of Hales-Owen:

The master of an apprentice is bound to keep him both in sickness and in health.

S. C. 1. Stra. 99.
S. C. Sett. &
Rem. 117.
S. C. 3. Viner
Abr. 27.

MOTION to quash an order for the discharge of an apprentice. Exceptions were taken:

FIRST, It is not shewed that he was bound to any trade.

SECONDLY, The justices discharge him because he had the king's evil, and thereby made perpetually incapable to serve. He cannot be discharged but for some misdemeanor.

THIRDLY, It does not appear that one of the justices who signed the order is of the *quorum*.

DARNELL *contra*. FIRST, Any of the inhabitants may take an apprentice, though he is not of any trade,

SECONDLY, The binding is for the sake of serving; the end therefore being impossible is a reason for discharging the contract, which is an incident to the jurisdiction of the contract.

THIRDLY, This discharge was at the sessions, therefore it must be intended that one of the justices was of the *quorum* (a).

PRATT, *Chief Justice*, as to the third exception: This is a discharge at the sessions, and a sessions cannot be held without one of the *quorum*; yet those justices who were at the sessions, and signed this, might not be of the *quorum*.

As to the second: The master is to keep the servant in sickness and in health; and unless the one or the other is guilty of a misdemeanor, the discharge is not warranted by the statute.

POWYS, *Justice*. I never knew a discharge of an apprentice for sickness.

It is presumed that some of the justices at the sessions are of the *quorum*; but this order must be under the hands of four, whereof one must be of the *quorum*.

EYRE, *Justice*. It is required by the act, that one justice of the *quorum* should sign. Misbehaviour, either of the mas-

(a) See the statute 26. Geo. 2. c. 27.

ter or apprentice, is the only point that gives the justices an authority to discharge him.

THE KING
against
THE
INHABITANTS
OF
HALES-OWEN,

FORTESCUE, *Justice*. The statute gives a limited jurisdiction only in case of misdemeanor, not of sickness, and we can go no farther.

It must be expressed that one of the justices is of the *quorum*.

By THE WHOLE COURT the order of sessions was quashed.

Paine's Case.

Case 360.

THOMAS PAINE was committed, by an order of the court of chancery, for hindering the execution of a decree upon his father; he removed himself to THE MARSHALSEA, and thence made his escape, and was taken again on an escape warrant.

If a prisoner escape from a commitment under an order of chancery for hindering the execution of a decree, he cannot be retaken on an escape-warrant under the statute 1. Ann. c. 6.

S. C. Stra. 100.

A motion was made to supersede the warrant, and that *Thomas Paine* might be discharged. This is not within the statute 1. Ann. c. 6. that grants escape warrants in such like cases; for that says in the preamble, "that divers persons committed by the queen's courts of record at *Westminster*, upon actions for the recovery of debt or damages, or for contempts in not performing orders or decrees made in courts of equity, have escaped;" and therefore, for remedy thereof, it is enacted, "that if any person committed, rendered, or charged into the prison of *The Queen's Bench* or *The Fleet*, either in execution, or upon *mesne process*, or upon any contempt in not performing such order or decree by any of her majesty's courts at *Westminster*, &c. shall escape, any one of the Judges of the court where such action was entered, or judgment and execution were obtained, &c. may grant a warrant to seize and retake such person, &c." This is only for the obstruction of an execution of a decree.

REEVES. This is within the reason, if it is not the words of the act; it was obstructing the execution of a decree.

PRATT, *Chief Justice*. To bring this case into the statute, it must be in not obeying an order or decree. The contempt may be said to be of an order of chancery, yet not such as in the act mentioned, for it is not for not performing an order which the act says must be; therefore the warrant ought to be superseded, for this is an act we cannot extend by equity.

POWYS, *Justice*. I think it is within the meaning of the act; but it being so penal as to extend to restrain liberty, we cannot go beyond the words.

EYRE, *Justice*, of the same opinion.

FORTESCUE, *Justice*. It is neither within the words nor within the meaning of the act, which was only to secure property to persons concerned, not to vindicate the public contempt of courts. This is not

PAINÉ'S CASE. not properly an order, but rather a judgment, and he was not to do anything but suffer; the words of the act "and in execution" seem the nearest to this, but they are still relative to debts and contracts.

THE COURT. The warrant must be superseded. But it appearing that he escaped out of our gaol, we *ex officio* remand him to it again.

Case 361. The King *against* The Townships of Walderham, &c. in the West Riding of York.

An order of sessions quashed, because too general

MOTION to quash an order of sessions in these words: "Ordered " that the poor of the several townships of *Waldersham*, &c, " be provided for according to the statute 13. & 14. *Car. 2.*"

PRATT, Chief Justice, POWYS and EYRE, Justices. The justices assume an original authority which they have not.

FORTESCUE, Justice. The order is void for the generality, if they had a jurisdiction; for it seems calculated to ensnare the overseers of the several townships.

The order was accordingly quashed,

Case 362.

Eyres against Hardres.

How execution may be sued out.

ON A JUDGMENT a *fiery facias* was sued out and returned within the year, and continuances entered up with a *vicecomes non misit breve* for several years; at last a *capias ad satisfaciendum* was taken out, without any *scire facias* to revive the judgment.

THE COURT. The reason is against this practice, but the authorities are all for it (a). There are precedents for it in the Entries (b). It has been the constant custom of the Court to enter continuances by *vicecomes non misit breve*, and it is the constant practice of the common pleas. The usage of a court time out of mind is the law of that court.

Therefore the execution is well sued out.

(a) See Co. Lit. 290. 2. Inst. 471. (b) Clift's Ent. 840. Off. Bryv. Mod. Cases, 283. 1. Keb. 159. and 96. Booth v. Booth, 1. Sid. 59.

MICHAELMAS TERM,

The Fifth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Nicholas Lechmere, Esq. Attorney General.**Sir William Thompson, Knt. Solicitor General.*

Trott against Gagg.

Case 363.

THIS was a motion to quash a writ of error. The record is against "*Gagg*, of the castle of *York* in the county of "*York*," and the writ of error, directed to *Sir Peter King*, says, "*in com. tuo*." In what cases a variance between the record and the writ of error is immaterial.

RABY. Procefs founded upon a record must be certain as to the description of the *person*, the *place*, and the *addition* (*a*). "*J. S.*" in the writ of attain, and "*G. S. of &c.*" in the record, has been held a variance. If the original certified had been in these words, "*of the castle of York, in com. tuo*," it would be error; as it is, it is right; which shews that it is different.

On the other side it was said, that the addition is not material in a writ which is only to remove a record. A *certiorari* to remove a conviction against "*A.*" and the conviction removed was against "*A. and B.*" and yet held to be well removed. In an action of covenant by *A.* assignee of *B.* the writ of error by the name of *A.* without the addition of assignee, held good (*b*). In the writ of error it was "*Floyd*," in the record "*Floy'd*" with an

(a) Year-Book 9. Hen. 6. fo. 1. pl. 3.

(b) Dyer, 356.

26. Affize, 123. pl. 2.

. addition,

TROTT
against
GAGG.

addition, but it was held to be well removed (a). If the addition is not material, and we take notice but of part, it is the same as if none, which is governed by the case of *Rogers v. Floyd*; and if this is uncertain, since SIR PETER KING has returned this record it must be taken to be the same, unless it appears to be such as cannot be the same. Where a writ of error was "*Wm. Evifon*," "gent." and the record "*yeoman*," it was taken to be the same (b).

PRATT, *Chief Justice*. In the case of *Rogers v. Floyd* the county was not held material, which shews it is not in this; and if it is not material, and uncertain whether it is the same or not, and does not appear to be another, we will never intend it to be so: but though it is not material, and is set forth and appears to be another, we cannot suppose it the same; therefore the case in *Stiles* cannot be law. These practices of bringing a defective writ of error are only for delay, and I am very glad we have authority to support the writ. I hold the record is well removed.

EYRE, *Justice*, of the same opinion.

FORTESCUE, *Justice*, of the same opinion. There are three things only necessary in the description in a writ of error: the action, whether by writ or bill; the names of the parties; and the Judges before whom it was. 1. *Roll*. 16, 17. *Sir Christopher Hales*. But if the writ shew more than it need, and that is variant from the record, it is not removed. MR. RABY's case goes upon another fact; they are all actions founded upon a record, or a bond, or on the case, and if those actions had been allowed, the plaintiff might have brought another.

PER CURIAM, *absente Powys*, The record is well removed.

(a) *Rogers v. Floyd*, Easter Term, 10. *Ann*. (b) *Dyton's Case*, *Stiles*, 153.

Case 364.

Arnold against Meredith.

Variance between bond and declaration.

S. C. 21. Viner, 540.

IN AN ACTION OF DEBT ON BOND the plaintiff declared against "John Meredith, late of the parish of *St. Ann's* in the city of *Westminster*, in the county aforesaid, otherwise called John Meredith, of the parish of *St. Ann*."

On oyer of the bond and setting it forth, it was "*J. M.* of the parish of *St. Ann's* in the county of *Middlesex*."

GAPPER. The bond and declaration must agree (a). In the bond it was "*J. D. capellar*," in the declaration "*cler*," and held naught (b): "*Sadler*" and "*Salter (c)*," "*Chandler*" and "*Innbolder (d)*," have been held variances in a writ of error. Process to outlawry lies on a bond, for which reason it ought to be most

(a) Bro. Abr. "Variance" pl. 52. 56.

(b) Bro. Abr. "Variance" pl. 55.

(c) 1. Keb. 464.

(d) 1. Sid. 104.

particularly

particularly set forth "*nuper de London*," and "*de London*" has been held bad (a).

ARNOLD
against
MEREDITH

On the other side it was said, that the cases cited shew that there must be an agreement. The case of "*nuper de London*," was because an outlawry was so penal, therefore must be most strict; in all the others it appears that they must be different; but this is not such a variance but may be intended the same, and is not so much a variance as an omission. It is upon a general demurrer, therefore he owns himself to be the same.

PRATT, *Chief Justice*. If the declaration and bond do not agree, it may be helped by the *alias dictus*, which is in the nature of an averment; but here the *alias dictus* does not agree with the bond, and therefore will not make good the other defect, which cannot be intended or supplied.

EYRE, *Justice*, desired to consider farther.

FORTESCUE, *Justice*. The cases of writs of error are not founded on a record; this description must be strict, because it is founded on a specialty. In a case, where it was "*Thorney, de in com. Notting. Esq.*" and in the declaration "*Thorney, Esq.*" leaving out the addition of the place, it was held bad (b). I know no difference between this case and outlawry.

Adjournatur.

THE COURT afterwards declared, that the variance was material; upon which the plaintiff moved to discontinue, and it was granted.

(a) Cro. Eliz. 49.

(b) 3. Cro. 313.

Gough against Crear.

Case 365.

AN ACTION was brought on a bill of exchange in the court of king's bench, and judgment given for the plaintiff; a writ of error was brought in the exchequer chamber and affirmed; on which a writ of error was brought in parliament, pending which the plaintiff in the original action brought an action of debt upon the judgment in the court of king's bench.

The Court will stay proceedings in debt on a judgment, pending a writ of error, if the action be vexatious.

The defendant moved for an *imparlance*.

PRATT, *Chief Justice*. The writ of error in parliament is a writ of right, which we ought not to discountenance; and this action seems vexatious, therefore we ought to grant an *imparlance*.

EYRE, *Justice*. The judgment was affirmed in the exchequer, which seems to shew that the writ of error in parliament was vexatious; and since there is no precedent we ought to discourage vexatiousness, and therefore not grant an *imparlance*.

FORTESCUE,

GOVERN
against
CREAR.

FORTESCUE, *Justice*. The action is vexatious. Though the judgment was affirmed, that affirmation is suspended by the writ of error in parliament, therefore ought not to be considered; and that will sooner be ended than this can, for this will be carried on by writs of error.

POWYS, *Justice*, was not in court.

The rule for an *imparlance* was made absolute.

Case 366.

Fenn against Alston.

"Samuel" and
"Samul" shall
be intended the
same names.

IN AN ACTION OF DEBT ON BOND the defendant cravedoyer of the condition, which being set forth he pleaded a *usurious contract*.

BRANTHWAIT, *Serjeant*. They have abated their declaration, for the bond produced does not agree with the declaration. The declaration is "*Samuel Alston*," and the bond is "*Samul*." In *Cro. Jac.* 640. the bond was "*Edmund*," the declaration "*Edward*," and though the jury on the trial found his name to be *Edward*, yet it was held bad, for that the declaration must follow the bond (a); and the reason is, that the defendant having signed the bond by the name of *Edmund*, he is estopped in pleading to say that is not his name.

WEARGE *contra*. "*Samuel*" and "*Samul*" must be taken to be the same name, or an abbreviation of it. When there is but a small difference between them, they shall be taken to be the same, unless they are apparently two different names, 2. *Roll.* 135. 1. *Mod.* 107. *Hill. 2. Geo. Child v. Goff.*

THE COURT. They must be taken to be the same name.

The judgment was affirmed.

(a) 1. *Roll.* 271.

Case 367.

Thomas's Case.

Practice of the
Court in grant-
ing attachment.

ON MOTION for an ATTACHMENT on a *nisi* rule against several, they all appeared except one *Thomas*, whom they could not find to serve with the rule.

THE COURT thought it reasonable to make the rule absolute against them all; but *Thomas* not being served with the *nisi* rule, the Court could not grant an attachment.

But there was an affidavit of *Thomas* produced before THE MASTER.

REEVES moved, that whereas there was an affidavit of *Thomas* it appeared he knew of the rule, and therefore prayed that it might be absolute against him.

But THE COURT would not do that, but directed that service of it on *Thomas's* attorney might be good service on *Thomas*.

Jeffs

Jeffs *Qui Tam* against Bolton.

Case 368.

PROHIBITION to the court of common-council in *London*, to stay proceedings in an appeal concerning the choice of a common-council-man (*a*).

Pleadings in prohibition to the court of common-council in *London*, concerning the choice of a common-council-man.

S. C. Fort. 349.
S. C. 2. Brown.
P. C. 58.

DARNELL. The common-council have declared in prohibition, and set forth their title to this consufance. The defendant in plea sets forth his title as an inducement, and concludes with a traverse of the plaintiff's title. The plaintiff, in his reply, traverses the defendant's inducement; to which the defendant demurs, and the plaintiff joins. The plaintiff's traversing the defendant's title is *a departure* from his declaration; for he is not at liberty to forego his own title which he has set forth, and impeach that of the defendant's, but ought to maintain that of his own, though the defendant's is not good (*b*). The nature of this question is, If the right belongs to the mayor and aldermen, or the common-council? They come to take this cause out of our court; they must therefore shew their right to our jurisdiction, and not say that we must shew our right; for *melior est conditio possidentis*.

SERJEANT WHITAKER *contra*. This is a suit *pro consultatione*, and the plaintiff in prohibition is obliged to intitle himself to a consultation, therefore the first traverse is immaterial. For a prohibition the defendant says, that the court of common-council has no jurisdiction to hold plea, and the plaintiff *minus jure* caused him to appear there; then to obtain a consultation, they must shew that the court the defendant has sued in has consufance; and to say the other has not, is immaterial. It differs from the cases of *Dyer*, 170, 171. and 2. *Hen.* 4. 9, 10. of prohibition for suing out of the diocese, and for *a modus*; for there it is apparent the Court has jurisdiction, and to take it out of the court there must be some ingredient, as in these cases, which must be shewn. We complain of a wrong; and saying the court of aldermen have the jurisdiction, is only inducement in us: their traverse is immaterial, and then our traverse is good (*c*). The cases cited on the other side are upon a *quare impedit*, which is different from this; every

(*a*) **THE PLAINTIFF** declared in prohibition, that he was elected and admitted common-council-man for *Tower Ward*, and that the defendant, intending to draw the examination of that election into the court of common-council, exhibited a petition for that purpose praying the plaintiff might be removed; whereas in truth the court of common-council has not any jurisdiction whatever to hear, determine, or judge concerning the election of any of the common-council, but that time out of mind the examination of such election belonged to the court of aldermen, and not to the court of com-

mon-council.—**THE DEFENDANT** pleaded, that time out of mind the common-council have had the examination of such elections, *abique hoc*, that the court of aldermen have the cognizance and examination of such elections.—**THE PLAINTIFF** replied, that the common-council have not, time out of mind, had the cognizance and examination; and offer an issue. But the defendant demurred.

(*b*) 2. Mod. 183, 184. Vaugh. 60. Hob. 101, 102, 103.

(*c*) Co. Lit. 282. 'b Cro. Eliz. 99. 407. Micor, 429. Foph. 101.

JEFFS
Qui Tam
 against
 BOLTON.

plaintiff must recover by his own strength, but here they must intitle themselves.

The question upon this record is, Whether the common-council have a jurisdiction? No matter whether the court of aldermen have or not; for if the common-council have not, this court cannot grant a consultation. That point we have put in issue, and they have demurred.

SERJEANT DARNELL *in reply*. If this rule holds, what will become of a demurrer to a declaration in prohibition? A consultation cannot go. They cannot take a cause out of a court without shewing where the jurisdiction is. Where there is a prohibition for a cause arising out of the diocese, or *a modus*, he who prays the prohibition is actor, and must maintain that the cause arises out of the diocese, or that it is *a modus*.

PRATT, *Chief Justice*. I did not expect an argument in a case that is so plain. Why do we prohibit the common-council? Not because the mayor and aldermen have the jurisdiction, but because the others have not. When they pray a consultation, they must shew they have a jurisdiction; the point they offer is, that the aldermen have none; if that is found, it must be immaterial. The authorities that the plaintiff must maintain his own right and deny the defendant's, is not in this case. The case of *a modus* is, because the Court has an undoubted jurisdiction; and if he will draw the case out of the court, he must shew a mixture of something in it that that court cannot try.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. If persons intitle themselves to a jurisdiction, or the use of it, they must maintain it. This is an inferior jurisdiction, and if the common-council have it not, they cannot proceed, though the other have not. There may be a traverse upon a traverse, when the first is immaterial.

FORTESCUE, *Justice*, was of the same opinion.

PER CURIAM. The prohibition must stand (a).

(a) The defendant brought a writ of error in parliament to reverse this judgment, but the judgment of the king's bench was affirmed. S. C. 2. Bro. P. C. 100.

HILARY TERM,

The Fifth of George the First,

IN

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Nicholas Lechmere, Esq. Attorney General.**Sir William Thompson, Knt. Solicitor General.*

Clerk's Case.

Case 369.

THE OFFICERS, by virtue of an execution against *Clerk*, took the goods which were his, but before execution *Clerk* had made a bill of sale of them to one *Francis*, who by violence took them out of the officers possession.

Francis moved for an attachment against the officers.

THE COURT said, that *Francis* might try the property, but refused to grant an attachment against the officers, for that they were justified by the execution.

The King against Vaux.

Case 370.

THE SHERIFF returned a *rescous* against the mother and sister of the person arrested. They came into court with affidavits of the state of the fact, and moved that they might submit to a small fine.

On a *rescous* returned, a small fine may be imposed.

SERJEANT DARNELL for the plaintiff moved, that they should pay the plaintiff the costs he had been at before they should be admitted to make this motion.

EYRE, *Justice.* We cannot now enquire of the costs.

Y 2

PRATT,

THE KING
against
VAUX.

PRATT, *Chief Justice*. I doubt whether this is not a hardship upon the plaintiff to make him maintain the sheriff's return, when perhaps he knows nothing of the fact.

FAZAKERLY. The plaintiff may have an action against the sheriff, if the return be false. And if this should be allowed, a bailiff may make such a return upon an innocent person; and the remedy against the sheriff is precarious, for it is personal, and he may die. There are but two women, and it cannot be supposed they beat two bailiffs.

PRATT, *Chief Justice*. Read the affidavits:

Which being heard, the Court fined them twelve-pence each.

Absente Powys.

Case 371.

Anonymous.

Court will not
change a *venue*
to *Bristol*.

MOTION to change a *venue* from *London* to *Bristol* on proper affidavits.

PRATT, *Chief Justice*. We cannot send it to *Bristol*, for there are no assizes the next Vacation. Let them shew cause why it should not be changed, and then perhaps they will consent that it may be tried in another county nearest where there is an assize; but if they do not consent, we cannot make such a rule.

Case 372.

Hainsworth against Wilson.

Variance be-
tween the re-
cord and the
writ of error.

MOTION to quash a writ of error, for that the record is "WILSON, *nuper de Castle de Ebor.*" and the writ "*nuper de Leeds in com. Ebor.*"

CHAPPLE *contra*. There is no necessity for the addition in the writ of error (a). The commorancy may be *nuper*; it is a word of relation, and must refer to the different times of serving out the writ of error and original; he might be "late of the *Castle of York*," at the suing out of one; and "late of *Leeds*," at the suing out of the other.

On the other side. In 1. *Sider.* 103. 193. the writ of error was abated for a variance in the addition of the place; it is not there shewed that the commorancy was with a *nuper*, but it may be supposed that it was so, because the constant form in the court of common pleas has been always with a *nuper*; and this court must judicially take notice of the forms of that court. *Gro. Jac.* 68. 98. A writ of error is to remove and defeat a record, therefore must not be favoured. That the law cannot incline to intend this the same person is plain, for that in other cases it requires an

(a) Dyer, 365.

avement of the identity of the person. Intent is that which is taken more strongly than the other, and not that which stands in different. *Godb* 111. 4. *Mod* 14. It therefore must incline more strongly that they are the same persons, than that they are different persons, or it cannot maintain this writ.

HAINSWORTH
against
WILSON.

FAZAKERLY. Though the addition of the place of commorancy is not necessary in a writ of error, yet if it be inserted, and that insertion is wrong, it is a variance. The Judge, upon the delivery of this writ to him, is to see if there is a record that answers the description; and not to enquire whether the party is removed from *York* to *Leeds*.

On the other side. In *Keb* 725. the Court inclined that there was no variance; but being divided, the parties took out another by consent.

CHAPPLE *in reply*. The writ of error is to describe the record; that shews the defendant to be *nuper* of one place; that cannot be a description of the record, which is *nuper* of another place.

PRATT, *Chief Justice*. It is not necessary that the writ should set forth the place of commorancy, but if put in it must be the same that is in the record, or we cannot take notice that the record described is removed. The difference is, if there be more in the record than in the writ, and that not a necessary part of the description, the writ is good; but if there be more in the writ than in the record, it is bad.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. Every thing that is in the writ must be in the record, though not *à contra*; and although the description in the writ is in part not necessary, yet the record must answer that description. There is no case against this rule.

FORTESCUE, *Justice*. I am not satisfied with this distinction. However the cases are, there is no difference in the reason of one or the other. The single question is only, Whether there is a variance or not, and why not in one as well as in the other case? The rule, as I take it, is, if the Court cannot suppose that the writ describes another record than what is before us, it must be taken to be the same. We ought to go as far as we can to support the writ. In 2. *Saund*. 291. the writ was "to the mayor, aldermen, &c. and every of them;" and the record was before them jointly.

PRATT, *Chief Justice*. I do not think this can be made good by intendment; it is sufficient to quash the writ, if it do not appear to be the record described in the writ. The cases in *Siderfin* are authorities for this rule.

EYRE, *Justice*. The case in *Saunders* was "to them and every of them," for the sake of the several directions.

HAINSWORTH
against
WILSON.

FORTESCUE, *Justice*. The cases in *Siderfin* are not authorities in this, for they are *de*, not *nuper*; then they are in different counties.

PRATT, *Chief Justice*. "*Nuper de*" must be verified as well as *de*.

POWYS, *Justice*. If the distinction is not in the Books, it naturally arises out of the nature of the thing.

THE COURT quashed the writ of error, against the opinion of FORTESCUE, *Justice*.

Case 373.

Clerk against Birch.

Prohibition to a
libel in the spi-
ritual court for
seats in the
church.

MOTION to shew cause why a prohibition should not be granted; they set forth in the spiritual court, that the churchwardens have, time out of mind, had the disposal of the pews of the church.

The ordinary has a jurisdiction of all pews in the body of the church, and they cannot be excluded by custom without some special amends to the ordinary for that; and the reason is, that they who have the disposal of the goods of the church only, cannot have the disposal of the inheritance. *Hob. 66. Ray. 246. 2. Lev. 241. 1. Salk. 167.*

E contra. Prohibitions have been granted on the same suggestions. *2. Roll. Rep. 24. 2. Roll. Abr. 288. 2. Lut. 1032.* In the last case there is no reason alledged for the custom. The custom might have a reasonable commencement, for the churchwardens might originally build the pews.

PRATT, *Chief Justice*. I believe this custom is general through London, and in many other places in England. The authorities contradict each other; it is not proper therefore to over-rule this on motion.

PER CURIAM. Declare in prohibition forthwith.

EASTER

E A S T E R T E R M,

The Fifth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Nicholas Lechmere, Esq. Attorney General.**Sir William Thompson, Knt. Solicitor General.*The King *against* Saunders.

Case 374.

RETURN of a coroner's inquest quashed for being in
English.

The King *against* The Mayor of Bridgewater.

Case 375.

INFORMATION was moved for last Term against ——— for acting as mayor of *Bridgewater*. By a charter of *Queen Elizabeth*, confirmed by *James the First*, they were incorporated by the name of mayor, aldermen, and burgesses; they afterward surrendered to *King Charles the Second* by the name of mayor, aldermen, and capital burgesses, and *King Charles* granted them a new charter, grounded upon the surrender and in consideration of it. The surrender being by a wrong name is void, and so is the charter grounded on that; and a rule granted *nisi*. But this Term, they not being able to shew that they ever acted under the new charter, the Court would intend that they acted under the old one, and discharged the rule.

Corporations shall be intended to act under the old charter, unless the contrary appear.

Case 376.

The King *against* The Parish of Burcleer.

Descent of a copyhold to a certificate-man gives him a settlement.

S. C. 10. Mod. 430.
Suange, 164.

LAST Term it was moved to quash an order of two justices, and of the sessions confirming that, for the removal of *Abraham Hatchett* and his four daughters from *Eastwoodhey* to *Burcleer*. *Abraham Hatchett*, by certificate from the churchwardens and overseers of *Burcleer*, came to *Eastwoodhey*; and they adjudge he is likely to become chargeable.

The exception was, that a certificate person is not removable until actually become chargeable. 2. *Salk.* 530. For this, cause was to be shewn why it should not be quashed.

The order of sessions set forth the fact specially, which was,

That *Abraham Hatchett* was twenty years settled at *Burcleer*, and went with a certificate from *Burcleer* to *Eastwoodhey*, and lived eighteen years there; that four years since a copyhold of twenty shillings *per annum* came to the wife of *Abraham Hatchett* by the surrender of her father; the wife afterwards died, and according to the custom the copyhold went to the eldest daughter; that about six months since he asked relief of the parish of *Eastwoodhey*.

MR. YORKE. To the exception, that a certificate person is not to be removed unless chargeable: it is expressly said in the order of sessions (though the original order takes no notice of it), that he asked relief at *Eastwoodhey*; and the rule, that an order of two justices cannot be made good by order of sessions, does not hold when it is in fact part of the merits.

As to the second point: He has not gained a settlement in the parish of *Eastwoodhey* by the copyhold, for the statute 9. & 10. *Will.* 3. c. 11. expressly says, that a certificate person shall not, by any act whatsoever, gain a legal settlement, unless he take a lease of a tenement worth ten pounds *per annum*, or execute an annual office. This estate comes by the act of the wife; and the statute says, by no other act than those two mentioned.

MR. REEVES *contra*. The surrender was not his act, but he came to the estate by act in law.

A leasehold, if a man live upon it forty days, gains a settlement.

The statute 3. & 4. *Will. & Mary*, c. 10. s. 7. says, a person not having child or children may gain a settlement by service, without notice. A widower had a child that had gained another settlement, and adjudged within this act to gain a settlement.

This statute is not explanatory, but a new law, and must therefore be taken more largely.

PRATT, *Chief Justice*. This act is a new law, and not explanatory of any former. I take it that those exceptions in the act prove this case, that they shall extend to all who come within the reason of them. If renting an estate of another person gain a settlement,

settlement, having one of his own will; it is stronger than the cases put in the act; and being a settlement it continues though the estate is gone, and nothing removes it but gaining another.

THE KING
against
THE PARISH
OF
BURCLEER.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. I do not think that the design of this act was to make a certificate person in a worse condition than any other; it was designed to take care of such persons. It must not be taken as an explanatory act, but as another of the same nature.

FORTESCUE, *Justice*. It is a certain rule that a person cannot be removed from his own freehold, therefore it is a settlement.

The statute says in the recital, that it was doubted if a certificate did not amount to a notice; therefore the acts mentioned to gain a settlement, are such as shall be done in pursuance or consequence of such certificate.

The estate comes to him by descent, which was not his own act.

PER CURIAM. Quashed.

The King against Gribble.

Case 377.

ORDER OF BASTARDY. It is not said that the child was Bastardy chargeable; nor that any complaint was made by the parish.

PER CURIAM. There is no occasion so to say, for nobody is to keep a bastard-child but the reputed father.

The King against Pocklington.

Case 378.

MR. WEARG. *Mr. Pocklington* signed a promise on the back of a warrant, to put in bail at the return of the writ, and though often requested by the officer, neglected. The sheriff was amerced to the value of the debt. The motion was for an attachment against *Pocklington*.

Attachment for not putting in bail pursuant to agreement.

PER CURIAM. We cannot grant that, unless there had been a rule that he should have put in bail. Let him shew cause why he should not pay the sheriff his costs, and put in bail according to the undertaking.

Alderman against Cutting.

Case 379.

TO AN ACTION ON BOND, the privilege of an attorney in the common pleas was pleaded; it appeared, by affidavit, that he was a prisoner in the king's bench.

An attorney in custody cannot plead privilege.

It was moved to set aside the privilege, for that the end of his privilege is gone, for that supposes him attendant on the court of common pleas.

PER CURIAM. Set aside the plea.

The

Case 380.

The King *against* Adams.

An order of bastardy must be on complaint of overseers.

ORDER OF BASTARDY. It does not appear that there was a complaint of the overseers of the poor of the parish where the bastard was born.

PRATT, Chief Justice. If the jurisdiction was only to indemnify the parish, there ought to be such complaint; but the act goes further, and says, for the punishment of the reputed father.

POWYS, Justice. And for the support of the child.

EYRE and FORTESCUE, Justices. It has been over-ruled.

An order to pay so much disbursed for a bastard child, and other necessary charges, is bad.

SECONDLY, The order directs five pounds to be paid, so much being disbursed for keeping the child, and other necessary charges thereby accruing.

THE COURT. The last part is uncertain; they should have shewed for what those charges did accrue.

An order to pay so much to put a bastard child apprentice, is bad.

THIRDLY. They order three shillings and sixpence a-week to be paid so long as the child shall be chargeable to the parish, and twenty pounds, at the age of ten years, to put him out apprentice.

PRATT, Chief Justice. They ought to order in certainty what must be paid.

FORTESCUE, Justice. So much *per annum* until the child shall be seven years old, has been quashed for uncertainty. Is not this as uncertain?

PRATT, Chief Justice. In that case, he might die before seven years of age; in this, if he dies before ten, the money will never be payable.

An appeal from order of bastardy must be to the next sessions.

FOURTHLY, It does not appear that the order of sessions was at the next sessions, it is only said at the general quarter-sessions, *Rex v. Shaw, Salk. 482.*

EYRE, Justice. There was a case in which that of *The King v. Shaw* was denied.

MR. RABY. Whether this sum of twenty pounds is not an excessive sum? If they give too little or too much, the Court may quash it.

DARNELL in reply. Whether this Court will examine into the reasonableness of the sum to be paid at ten years of age, for the putting out apprentice? If it be not at the right sessions, it is their default that they did not appeal to the right: but if this is quashed for that, the original order must stand. But it is said, "being the next general sessions." There is no arguing from the date of the order, for it might be served after the next sessions.

PRATT, Chief Justice. The justices are to indemnify the parish; if they have done that, it is sufficient; if it is excessive, the Court

Court may judge of that, and quash it. The only question then is, Whether this twenty pounds is so, or not? A child may be put out for five pounds; then they are not to consider the circumstances of the reputed father and mother, but the child is a *filius populi*, and for the indemnity of the parish, which is the intent of the act.

THE KING
against
ADAMS,

POWYS, *Justice*. We may enquire into the extravagancy, but I think the circumstances of the reputed father are to be considered; ten pounds has been allowed in this court, and it may be for punishment of the reputed father.

EYRE, *Justice*. I do not doubt but if it was unreasonable we might quash it. But I do not think it unreasonable; they are not obliged to put him out to a mean trade, for the statute says they are to consider the fact and circumstances of the person. It cannot be for his punishment, I allow.

FORTESCUE, *Justice*. Two things are in the jurisdiction of the justices, the punishment of the party, and relief of the parish: the punishment is to be corporal; then what is beyond is the security of the parish, and this is unreasonable, and not to be justified by precedent: there is a provision until the age of ten years; then "to put him out an apprentice," is such an apprentice as parishes usually put out. The sum I think excessive.

EYRE, *Justice*. If we quash it as to this sum, I question whether the justices can make any other order, for they have executed their jurisdiction.

PRATT, *Chief Justice*. That is a reason why we should quash none: if unreasonable, this cannot be to punish the party, for the money is payable to the overseer.

THE COURT being divided, the order cannot be quashed.

Atkins *against* Berwick and Others (a).

Case 381.

TROVER by the plaintiff as assignee of commissioners of bankrupt. The case was, The defendants were mercers and partners, in the habit of selling goods to *Crisp* and *Qualm*, who were the bankrupts. On the seventeenth of April 1715, the defendants sold to, and sent into the country by the order of, *Crisp* and *Qualm*, a parcel of goods to the value of one hundred and fifty-one pounds, and *Crisp* and *Qualm* gave credit in their books, they being before indebted to the defendants. On the eighteenth of May following, *Crisp* and *Qualm*, without the order or the knowledge of the defendants, sent the same goods to *Penhall*'s for the use of the defendants. On the ninth of June the commission issued, and the goods were assigned to the plaintiff. The defendants received not the letter of advice of the delivery of the goods to *Penhall*, for their use, until the thirteenth of June, and then they signified their consent to accept the goods.

A delivery of goods to A. to the use of B. upon a precedent consideration, vests the property of the goods in B.
S. C. Fort. 353.
S. C. 10. Mod. 432.
S. C. Stra. 165.
Cowp. 117.
5. Term Rep. 211. 402.

(a) From MR. PAGITT.

The

ATKINS
against
BERWICK
AND OTHERS.

The question was, Whether the plaintiff is well entitled to those goods as assignee of the commission?

MR. REEVES. By the sale on the seventeenth of *April* the property of the goods was well transferred to the bankrupts. If anything is stated to divest the plaintiff, it is, that on the eighteenth of *May* *Crisp* and *Qualm* delivered a parcel of goods (it does not appear whether the same that were sold in *April* to them) to *Penball*, for the use of the defendants. That delivery, without the defendants order, divested no property out of the bankrupt, for the defendants were not obliged to accept the same, and before acceptance the bankrupt might have countermanded the delivery. The letter was not until two days after the act of bankruptcy, so a private delivery. By the statute, all the goods of the bankrupt, at the time of the act of bankruptcy, are saleable by the commissioners to the creditors equally. This does not appear to be a contract to satisfy any debt, for the letter only tells them of the delivery to *Penball* for their use; which they, seeing their circumstances to be declining, did not enter in their books, which they might if they had thought fit. They neither deliver nor accept in satisfaction, but without any consideration; so that it is fraudulent against the other creditors. 1. *Mod.* 76.

PRATT, *Chief Justice*. It being without consideration is not fraudulent, but only the evidence of fraud, and we cannot adjudge it so. The acceptance was after the commission issued, of which the defendants must take notice.

DARNELL *contra*. The delivery before they became bankrupts is an alteration of the property, and an interest is vested in the *cestui que trust*, not countermandable by the deliverer; it appears to be a satisfaction as plainly as may be. *Dyer*, 1194. 2. *Leon*. 30. *Cro. Jac.* 667. The parcel of goods sent, may go to satisfy for goods before sent to *Crisp* and *Qualm*, *Styles*, 296. *Yelv.* 164. they did not for that reason enter them in their books, but delivered the goods to *Penball* for their use; and in *June* following a commission of bankruptcy issued out, and *Crisp* and *Qualm* being found bankrupts, their goods and chattels were assigned to the plaintiff. The defendants received not the letter till the thirteenth of *June*, nor had they before any notice of the delivery to *Penball*: as soon as they could notify their consent to take the goods back again they did, and never refused to accept them. There being a precedent debt, the delivery must be adjudged in satisfaction of that debt.

REEVES *in reply*. If by way of accord and satisfaction nothing vests until the accord is executed, which is not until acceptance, before which the commission was awarded, the cases only prove that delivery to *A.* for the use of *B.* without consideration is countermandable, nor could this delivery be pleaded by *B.* in bar of the debt.

PRATT, *Chief Justice*. If the property is not altered until acceptance, the act of bankruptcy may prevent it. As to the consideration,

sideration, I think it appears to be in satisfaction of the debt, though act subsequent of *cestui que trust* may prevent it; it vests *prima facie* in him; and if so, it is an absolute alteration of the property after acceptance, and not in the power of either party to alter the contract.

ATKINS
against
BERWICK
AND OTHERS.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. The question is only, If divested? By the redelivery to *Penhall* we are not to intend any fraud in this case. These are goods delivered on a consideration; and all the Books agree, that if goods be delivered on a consideration to a third person, they vest in a second. In *Dyer*, the Judges differed only as to the countermanding, all held it good on the consideration. *Yelv.* 22. 24. 2. *Cro.* 687. Debt lies for the money, or trover for the goods against the party. *Rast.* 159. 1. *Bulst.* 68. The property of money or goods is altered upon delivery to a third person. 3. *Co.* 26. *b.* says it vests by the gift, and that there is no necessity to have an agreement.

FORTESCUE, *Justice*. How can these goods be divested? A bailment generally divests no property without saying to what use. *Zouch's Case*, *Plow.* That a bailee is not to answer for them, has been held in this court, because it is an act of kindness. Here is a bailment to a use. But to consider it as a sale or contract: A contract executed cannot be defeated, otherwise if executory; if it enures as a gift, it would be fraudulent; in which case, if refused, no property divests. There must be actor against actor, and a price agreed on; for sending goods without that alters no property. This case goes under a notion of payment and satisfaction, or delivery of goods on consideration; but certainly he might have disagreed, and so discharged that satisfaction.

PER CURIAM. The defendants have the title to these goods (a).

(a) See Note to S. C. 10. Mod. 431. and the case of *Barnes v. Freeland*, 6. Term Rep. 80.

The King against Grant.

Michaelmas Term, 5. Geo. 1.

Case 332.

MOTION for an information for acting as mayor of *Taunton* in what cases in *Somersetshire*, for that he had not subscribed the Declaration against the Solemn League and Covenant. the Court will grant information *pro warrant.*

There were two previous points:

FIRST, Whether a common person may have this information; that is, whether it ought to be granted except at the prayer of the attorney-general?

CHESSHIRE, *Serjeant*. The prayer of the information implies that the Court may deny it, or else they might take it without leave. In the attorney-general's name there is a right to it, *Yelv.* 192. 1. *Bulst.* 55. it is his majesty's royal writ. But an information granted in the name of the clerk of the crown office, is founded

THE KING
against
GRANT.

founded upon the statute 9. *Ann.* and it is calculated to assist the subjects to their right, where other ordinary methods are ineffectual, as appears by the preamble. The statute for amendment relates to civil actions between party and party, and information has been allowed to be within it.

Then, Whether this Court will grant this information without they know a relator, and that it is one who has been grieved?

Whether upon the affidavits there appears a criminal charge? They say he did not subscribe before the preceding mayor; he has liberty afterwards to subscribe it before a justice by the statute, which they should have shewed that he did not. It is to be subscribed before the charter magistrate, if not before two justices of the corporation, if none of the county. *Rex v. Stafford, Mich. 8. Will.* he did not take the oaths of allegiance and supremacy at the same time as the oaths of office of town-clerk of *Oxford*. There should have been a tender of the oaths to him.

SERJEANT WHITAKER. Before 4. *Will. & Mary*, the master, *ex officio*, might file an information, and the attorney-general might enter a *nolle prosequi*. Every *English* subject has a right to lay before the Court a breach of the laws, though not concerned, which is frequently done in the case of a nuisance. The information in the *Case of Harford, 8. Will.* was in case of a person not concerned. The statute 9. *Ann.* was not designed to restrain any one from having an information, for the title of the statute is for rendering these actions more speedy and effectual; the words do not restrain it to a person interested: all that the Court is to expect is, that there should be sufficient ground for an information, which we shall shew, and care for the cost. We shall name a relator.

There is no necessity for a tender of the oaths; the twelfth section of the statute is only an additional provision that the law shall be performed, "That no person shall, &c. that shall not have " within one year before taken, &c. and subscribed, &c. and in " default, every such election, &c. to be void." In the case of *The King v. Stafford*, the party is at his peril to take the oaths; for otherwise, by collusion between him and the officer to tender, he may avoid the statute: *The King v. Thacker, 5. Mod. 208.* cited in that case.

MR. YORKE. It does not follow that because we must pray this information of the Court, that it must be denied; but on the contrary, that if cause be shewn it must be granted.

TO THE SECOND QUESTION. The charge in the affidavits is as far as we can go; if they did at any other time, they must shew it in discharge of themselves; though I question if it must not be all done at a time: these affidavits need not be certain to every intent, as a return to a *mandamus*.

The

The *Cases of Dennings and Norris* do not shew that there must be a tender: the *Case of Slatford*, 2. Salk. 429. is, that he must take them at his peril, and if refused, may have a *mandamus*.

THE KING
against
GRANT.

PRATT, *Chief Justice*. The words of the act are, that it shall be lawful for the proper officer, at the request of any person; and there is no restraint either in the title, preamble, or body of the act. It is the most noble provision for the rights of the subject, and all the subjects of *England* have an interest in the corporations that send members to parliament; and every usurpation upon the Crown concerns the liberty of the subject.

The intent of the statute is, that no person shall act who has not given this, which the parliament thought a reasonable security; and if they need not tender themselves to take the oaths, they may elude the act: it may have a reasonable construction the other way; the magistrate ought to tender, and if he do not, he may be punished. 'I he party at all events must take the Sacrament, and why should he not take the oaths at all events?

The affidavit is sufficient, for the presumption is, that if he did subscribe he did it all at the same time; and that he did not at any other time, is a negative impossible to be in the knowledge of the person who applies here: that should appear, if you did, by affidavits on your side.

POWYS, *Justice*, The same in all.

EYRE, *Justice*. I do not think it fit for us to grant an information at the motion of one who comes in the nature of a common informer. At first it was considered as an usurpation upon the right of the Crown; and afterwards, of a power to oppress the liberty of the subject: the common course has been, for it to be brought by one entitled to the office or interested in the franchise. The *Case of Hartford* went the farthest, but that was prosecuted by the inhabitants of the town, who thought they had a right to be freemen, except two or three. The Court has a discretion to grant it or not. The circumstances of a private person may be such that I cannot say what the Court would do; but the Court may consider whether it will grant an information or no to such particular person. I think it not proper to grant it in this case, for it is a matter that ought to come by the attorney-general. A private person ought not to start a matter of this consequence; if any private individual should move for an information against the city of *London* to-morrow, we must grant it if we grant this.

FORTESCUE, *Justice*. The consequences would be the same if a person who had a right prayed this. Most certainly we may grant an information. It is not proper to say "no" because you are not of the corporation, for it is a matter of consequence to the public. The act is as plain as possible, and takes in cases of usurpation, intrusion, or unlawful holding; the last takes in every thing, and is to be granted at the prayer of any person whatsoever.

As

THE KING
against
GRANT.

As to the tender: It is an old point settled, that he must take them at his peril; if the proper officer refuse, he may go out and take them before a justice, and that is the use of the provision.

As to the affidavit: It ought to appear on the other side.

To the main point the Judges declined speaking, for that it was to be laid before all the Judges, and their opinion to be reported to his majesty; which was done, and remedy provided accordingly by parliament.

TRINITY

T R I N I T Y T E R M,

The Fifth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Nicholas Lechmere, Esq. Attorney General.**Sir William Thompson, Knt. Solicitor General.*

Morris's Case.

Case 383.

MR. YORKE moved for leave to plead *antient demesne* to *Antient demesne.*
 an ejectment; which, upon reading affidavits that the
 lands were so, the Court granted.

The King *against* The Parish of Lowton.

Case 384.

MANDAMUS, reciting an unequal rate for the poor by omis- *Return to a man-*
 sion of some of the inhabitants, commands an equal rate to *damus.*
 be made. The return was, that he had made an equal rate upon
inframentionat. inhabitant. et occupator. terr. et al. rerum infra
paroch. prædict. taxabil.

MR. REEVES. They should say they had made assessment upon
 all of them; *inframentionat.* is by some of them to be satisfied.

WHITAKER. It follows the words of the writ; besides it is
prout per breve prædict. præcipitur.

THE WHOLE COURT. That it is a good return.

Case 385.

The King against Corrott.

Indictment for not repairing a highway *ratione tenuræ*, without saying *suæ*, is good.

MOTION in arrest of judgment on an indictment for not repairing a highway, *ratione tenuræ domus mansionalis*.

MR. YORKE. It should be *ratione tenuræ suæ*, otherwise it cannot appear that he was bound by tenure to repair, for that is a charge upon the occupier; and as this is laid, the defendant might have the inheritance and another the possession, so another, not the defendant, be chargeable. *Latch*, 206. *Noy*, 93.

REEVES contra. It is *ratione tenuræ domus mansionalis prædictæ*, and before the house is said to be the defendant's *domus mansionalis*. If it is his dwelling-house it must be taken to be his occupation, but it is not needful to be *suæ*, or appear to be so. The case in *Noy*, 93. is over-ruled by the case in 1. *Vent.* 331.

YORKE. *Domus mansionalis* does not necessarily imply the house he dwells in; for it being in *Latin* it may be construed a dwelling-house not necessarily his.

THIS TERM IT WAS RESOLVED BY THE COURT, that it is supplied, if it was necessary it should appear that the house should be in his occupation, for that it is *domus mansionalis*. But *ratione tenuræ terr.* without saying *suæ*, is sufficient; as is adjudged in the case of *The King v. Fanshaw*, *Mich.* 30. *Car.* 2. 1. *Vent.* which record we have seen and considered.

Case 386.

Anonymous.

An attorney in custody on a *habeas corpus* cannot plead his privilege.

AN ATTORNEY of the common pleas in custody removed himself by *habeas corpus* to the king's bench prison, and afterwards to an action pleaded his privilege.

THE COURT adjudged, that the *habeas corpus*, and being in custody upon that, was a waiver of his privilege as well in other actions as that in which the *habeas corpus* was brought, and set the plea aside.

Case 387.

Taylor against Jeffs.

In ejectment, the declaration must be personally delivered, if the defendant can be found.

A LEASE was signed on the premises, and an ejectment left in the house, on which a judgment was had. The defendant made an affidavit, that though he lived not at that house, he boarded at another in the town; that he never absconded, but might have been found almost at any time to have been served with a declaration. And the plaintiff's affidavit not denying that he knew where he was, nor affirming that he had enquired for him,

THE

THE COURT set aside the judgment; for the defendant should have been served with, or had notice of the declaration, he being to be found.

TAYLOR
against
JEFFS.

Anderson against Buckton.

Case 388.

Hilary Term, 5. Geo. 1.

TRESPASS *quare clausum fregit, et cum averiis* did beat and trample, and that the *averiis* had infectious diseases, *ed quod* they infected the cattle of the plaintiff that several died. On not guilty pleaded, a verdict was found for the plaintiff, and twenty shillings damages. Where the plaintiff shall have full costs, though the damages are under 40s.

Strange, 192.

FAZAKERLY. This is within the statute 22. & 23. Car. 2. that says, where the freehold may come into question there shall be full costs; but here it cannot, for it is only a trespass with aggravating circumstances, and not a different branch of the same action. 2. Cro. 122, 123. *Newman v. Smith, Trin. 5. Ann.*

Trespass would not lie for infecting the cattle.

BOOTLE *contra*. Where there is anything special arises from the cause of action, there, though for the cause of action full costs are not to be allowed, yet for the whole, that is the consequential damages, they will be allowed. If a proper action had been only for the consequential damages, then full costs would have been given; and adding the *clausum fregit* shall not prevent that.

PRATT, *Chief Justice*. Consequential damages brings it out of the statute; he ought to have damages for infecting his cattle, and might have had an action upon the case for it, and then had full costs. But it is a new case, and ought to be considered.

POWYS, EYRE, and FORTESCUE, *Justices*, the same.

This Term, MR. RABY said, This is within the statute. Ray. 487. Salk. 208. The matter of infecting is but a further circumstance, and only matter of aggravation, and one entire, not two trespasses. 2. Vent. 48. Salk. 642. The statute is meant to include frivolous actions, whose damage does not amount to more than forty shillings; this, with all its aggravating circumstances, is under that sum.

MR. REEVES *contra*. It is agreed that the statute has not been construed according to the words, but the intent: the intent was to prevent an action for small trespasses not designed. This is a compound action; each matter might be separate, and by reason that it was all done at the same time, it may be joint. In an action upon the case for infecting the cattle, the plaintiff would have had full costs for that; and on the trial in this case he might have been found not guilty as to the infecting, and guilty as to the trespass. For slandering title there has been given full costs; yet the

ANDERSON
against
BUCKTON.

the statute says, it should not be so in all actions for words. But it is held not the intention of the act, for it is not taken to be vexatious or frivolous. Where a different matter, for which a different action lies, is joined, full costs are allowed. 1. Cro. 163, 307.

PRATT, Chief Justice. I think he ought to have full costs, where anything is alledged as a consequence of the trespass for which he might have a satisfaction in another action, and though the other action is not of the same nature as this, and differs from it, where the aggravations are such for which the plaintiff could not have a different action.

POWYS, Justice, the same.

EYRE, Justice. I do not think the plaintiff ought to have full costs: a *clausum fregit*, and impounding, are distinct causes of action, and laid as such. Battery of a servant *per quod servitium amisit*, the *per quod* is not an aggravation, but consequential, the *git* of the action. On 21. Jac. for slandering titles, the reason is, for that the defamations should arise from the natural import of the word. This could not subsist by itself in this action, if it was found for the infecting only.

FORTESCUE, Justice. There ought to be full costs. The infection is a new damage and injury, and the action is brought as well for the one as the other. There have been full costs for entering his close and killing his cattle; this is destroying his cattle, therefore the case comes up to this.

PRATT, Chief Justice. I believe the statute confines it to pure simple trespasses, *quare clausum fregit*.

EYRE, Justice. It ought to be such as could stand of itself in this declaration, not a matter for which another action would lie. If there was a recovery for this infection, cannot they recover it again in an action upon the case?

PER CURIAM. The plaintiff to have full costs,

EYRE, Justice, not desiring to have it further spoke to.

Cafe 389.

Hargill against Hunt.

The Court will not grant a prohibition after sentence, if the inferior court has jurisdiction over the cause.

MR. KETTLEBY. To shew cause why no prohibition should be granted for calling whore in *London*: That the libel for prohibition was after sentence in the spiritual court.

PRATT, Chief Justice. The ecclesiastical court has an original jurisdiction in this case, and to take that away there must be shewn a special custom. After sentence we can intend nothing but what appears; and though it is the custom of the city to punish whores, we can no more take judicial notice of it than of all other customs.

customs. The reason why a prohibition is granted without an affidavit of the custom, before sentence, is, that it is common and not controverted. It is not sufficient that, before sentence, you do not admit of the jurisdiction, but you must deny it.

HARGILL
against
HUNT.

POWYS, *Justice*, the same.

EYRE, *Justice*. It is like a libel for tithes; we must have an affidavit of the *modus*. We cannot take judicial notice of the custom, though it is every day admitted in this court. If it was found by verdict and so on record in this court, it concludes only the parties to that record, and as to others it must come on again properly as before.

FORTESCUE, *Justice*. The difference is, when there is no jurisdiction, you are never too late for a prohibition; but where there is a matter triable, you must apply before sentence. Here is a jurisdiction, and the custom is a fact triable, of which we cannot take judicial notice.

PER CURIAM. Discharge the rule.

Anonymous.

Case 390.

THE COURT never quashes an indictment for a nuisance on motion, but the defendant must demur.

Nuisance.

Markham *against* Dutra.

Case 391.

BREACH OF COVENANT on a charter party. The covenant was, that the defendant shall pay all primage and average accustomed. It is shewn, that the ship, by storms, received damage in her rigging to the amount of four hundred pounds; that the defendant ought to pay one hundred and seventy pounds as his share of it.

How a covenant to pay "primage and average accustomed" shall be construed.

EXCEPTION. That this is not average; that it is only where some goods are thrown over to save the rest. *Cole's and Blunt's Law Dictionary. Lex Mercator. lib. 1. cap. 6. fo. 118.*

THE COURT took time.

EYRE, *Justice*. Average of custom, is only the duty to be paid to the master for care of the ship.

PRATT, *Chief Justice*. I have not had time to look into it, therefore let it stay until the Court is further moved.

The defendant prayed that the judgment might be reversed as to that, and that he might take judgment for the rest.

CURIA. Be it so.

EYRE, *Justice*. You may find average of custom in the statute of 32. Hen. 8. c. 14.

Case 392.

The King *against* The Parish of Wentworth.

Order of bastardy.

MR. REFVES moved to quash an order of sessions for quashing an order of two justices. The woman being at *A.* by the order of removal from *W.* (which was not a good order) was delivered of a bastard. The sessions set the first order aside for defect of merit, and ordered the bastard to be at *W.* The sessions has no power to proceed further than to set aside the former order, and cannot adjudge the settlement of the child; for that will stop and prevent *W.* from sending the child not only to *A.* but any other place that may be the place of settlement.

CURIA (PRATT, *Chief Justice, absente*). It is but as the law directs, and therefore will not prevent the removal to another place, therefore good.

Case 393.

The King *against* Edwards.

Exercising a trade.

INDICTMENT for exercising a trade, not having served his time.

EXCEPTION. That in the margin is "*Burg. Warwick*," without shewing in what county, nor is it shewn any where in the indictment.

PER CURIAM. There not being a county shewn where to direct a *venue*, therefore quashed.

Case 394.

Anonymous.

Assumpsit for hire of a horse is good on the *quantum meruit* without stating the time.

JUDGMENT by default in the common pleas, and a writ of error. It is an *assumpsit* in consideration the defendant would let him a horse *per magnum tempus*, to ride about his business, to pay *quantum meruit*; that he had the horse *per magnum tempus*, and that he deserved ten pounds.

EXCEPTION. That it is not sufficiently certain, for that it is not shewn for how long he had the horse; that it is in nature of forbearance *per paullulum tempus*.

PER CURIAM. This is not in the nature of that, but of goods sold and delivered, without shewing what quantity; or for meat, drink, washing, and lodging, without saying for what time. It is sufficiently certain in shewing the defendant had the horse, for which the plaintiff deserved ten pounds.

Judgment affirmed.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice (a).**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Nicholas Lechmere, Esq. Attorney General.**Sir William Thompson, Knt. Solicitor General.*

Earl against Coleman.

Case 395.

BRAINTHWAITE, *Serjeant*, moved for costs of the writ of error on a judgment in the court of common pleas, and want of an original assigned, and no original returned. On a second *certiorari*, on diminution alledged, an original was returned, on affidavit that the original was granted out of chancery since error brought; and said it was like the case of an amendment, which was never granted without costs. Costs in error, when allowed.

THE COURT. This motion must be denied; for costs cannot be given unless by statute, and the court of chancery, seven or ten years after, will grant an original to affirm a judgment. The proper motion would be in the common pleas, not to let it be filed until costs paid. The case of amendments is different; for there, if you ask a favour, we will not do it, without doing justice by the payment of costs.

(a) NOTE.—*SIR JOHN PRATT, Knt.* was absent all this Term, being ill of an ague and fever.

Case 396.

Fisher *against* Sparrowhawk.

Variance.

ERROR ON A JUDGMENT in the common pleas. No original assigned, and an original in trespass certified; and the declaration was on *in simul computassent*.

It was objected by MR. WEARG, that this was not within the statute; for that it could not be called a variance, which implies a similitude in nature and species, but a quite different and distinct species. They might as well bring an appeal of murder, and declare on a promissory note.

THE COURT. This is the original upon which the plaintiff founded his action, and is a defect in substance; and the words of the act are, "defect in substance, form, and variance." The construction of 16. & 17. Car. 2. c. . of trial in foreign county, 2. Saund. is exactly the same as this act, which has been adjudged accordingly in Lord Chief Justice HOLT's time. This is within the act; therefore

Judgment must be affirmed.

Case 397.

Graham *against* Leach.

A writ of error tested previous to the cause of action is not amendable.

BRAINTHWAITE, *Serjeant*, moved to quash a writ of error, being tested before any cause was in court, viz. the fourth of April, and the action was commenced *Easter Term*, which began on the fifteenth of April, returnable in *Trinity Term*.

PER CURIAM. It must be granted; for there must be a *loquela quæ fuit in cur. nostrâ. Si judicium reddit. fit* has been conferred before the return. It is not amendable by the act, unless the instructions to THE CURSITOR were right; a *teste* not amendable being matter of skill for which there are no instructions. And *Gage's Case*, *teste* of a writ of covenant, and *teste* of a judicial writ, is amendable, because the instructions are from the award on the roll.

Case 398.

The King *against* Morgan, Mayor of Bridgwater.

Information in *quo warranto*, in what cases granted.

THOMPSON, *Solicitor General*, moved for an information, in nature of *quo warranto*, against the defendant, for that the corporation was incorporated in *Queen Elizabeth's* time by the name of "mayor, aldermen, and burgesses," and acted accordingly. In 1683, the then mayor surreptitiously surrendered the old patent by a wrong name, viz. "mayor, aldermen, and capital "burgesses," and got a new patent with several new powers, and are now acting under it, which is void, being grounded on a void surrender.

PER

PER CURIAM. Motion denied. There has been no interruption for thirty-five years, which would give a title except in case of a franchise. Here is no contested election, no election of any one under the old franchise. The right of a particular person only is not in question, but the being of the whole corporation, if this is a matter of usurpation; for that reason it would be proper on the application of the attorney-general for the Crown.

THE KING
against
MORGAN,
MAYOR OF
BRIDGWATER.

The King *against* Wilders.

Case 399.

INDICTMENT, for selling as a fraud one hundred and forty for one hundred and forty-four gallons of beer, being a brewer, quashed on motion of **SERJEANT DARNELL**, for that it is matter for an action on the case only, not for an indictment, which lies only for false tokens, conspiracy, or a cheat: here does not appear to be any, for it might be very innocent, only a mistake.

Fraud must be
by false tokens.

The Parish of Somerby *against* The Parish of Stretton. Case 400.

MOTION to quash an order of removal by two justices, removing a pauper from *Somerby* in *Leicestershire* to *Stretton* in *Lincolnshire*. The party had been removed from *A.* in *Lincolnshire* to *Somerby*. The parish of *Somerby* appealed to the quarter sessions in *Lincolnshire*, where the order was confirmed on the merits. After that, the parish of *Somerby* applied to two justices, who removed the same party to *Stretton*.

An order reversed is final to the parties.
Strange, 232.

It was contended, that this last order is void; that the order of confirmation is final to all the world, unless a new settlement be gained subsequent (*a*).

THE COURT granted a rule to shew cause.

CARTER. They have come too soon, for the time of appeal to the last order is not out; and on that we might have shewn that the party gained a subsequent settlement at *Stretton*, which by this removal we are hindered of.

HORSEMAN contra. That the party has gained a settlement at *Stretton* cannot be presumed, for the Court will not presume any fact to make an order good, 2. *Salk.* 472. The Court will not presume notice, though there has been an inhabitation for six years. If it had been so, it ought to have appeared on the face of their order, that the party had gained a settlement subsequent to the confirmation.

EYRE, Justice. There cannot be an appeal now the order is brought here.

PER TOTAM CURIAM. There is a rule, though not observed, that no order should be brought here before determination on appeal.

(a) *Alderton v. Felington*, 2. Bott, 810. pl. 765.

EYRE,

THE PARISH
OF SOMERBY
against
THE PARISH
OF STRETTON.

EYRE, *Justice*. It being here and filed, there cannot be now an appeal. When you was served with a *certiorari*, you should have applied here to prevent the filing.

PER CURIAM. The rule was made absolute.

Case 401.

Shelton against Sire.

A bond conditioned, that the obligor shall remove himself and his family from a particular parish, and not return to live therein as an inhabitant without permission from the obligee, is good.

ACTION ON A BOND, and on *oyer* a demurrer. The condition was, that the defendant should remove himself and family, and not return to live in the parish as an inhabitant without leave of the plaintiff.

DARNELL, *Serjeant*. The condition being a restraint upon the liberty of the defendant, and there being no consideration for that, it is a void condition. In the case of *Michell v. Reynolds* (a) there was a consideration appearing, and the bond was for assigning over his house and trade; but in that case it was laid down, that when the obligation is restrictive of any liberty the defendant has a right to, it is void: It is general, and the rule extends as well to liberty of inhabiting as trading. In the case of *Dower v. Rench* (b), where a condition appears to be restrictive of liberty it is void, unless there appears a consideration. A person may possibly be restrained by a false recital, but I believe it may as well be pleaded as the statute of Usury.

SERJEANT REYNOLDS *contra*. All the cases of restrictive conditions being void without a consideration, is where they are restrictive of trade, which differs from the case at the bar; for they restrain *bonum publicum*. The interest and regard of the public is concerned, 2. H. 5. fo. 5. b. 2. *Bulst.* 210. He may come there not as an inhabitant, and yet he may buy and sell and trade there. Suppose there had been a dispute whether he was an inhabitant there, he might lawfully have bound himself from coming there as such: it is therefore no more than what he might lawfully do. Every condition is restrictive of liberty.

POWYS, *Justice*. Suppose a freehold should descend to the defendant, he may have a right to come to it, and if he does he shall forfeit his bond. *Michell v. Reynolds* did turn upon the convenience of trade.

EYRE, *Justice*. I do not see that the liberty of trade is concerned in this, and on that foot it is that those cases were adjudged. A bond implies a restriction. A person may restrain himself from buying an estate in such a place, or aliening to such a person. There is no occasion for a consideration, where a bond is restrictive of common liberty, except in trade.

(a) 10. Mod. 27. 85. 130. 1. Peer. (b) Wms 181. For. 296.

FORTESCUE, *Justice*. It is only in that case that it is required. This bond can neither be *malum in se*, nor *prohibitum*, and *volenti non fit injuria*: besides, it may be both reasonable and just. The Court never could say, that an obligation to restrain the liberty of a person generally, was void without a consideration; it is only with regard to the public, as not to sow his land.

SHELTON
against
SIRE.

DARNELL, *Serjeant*, prayed that it might go over to next Term.

EYRE, *Justice*. I see no cause for its standing over.

THE COURT gave judgment for the plaintiff.

Beacon against Peck.

Case 402.

AN ELEGIT was sued out and returned *nihil* as to lands; and an execution of goods to the value of part of the judgment. The plaintiff took out a *capias ad satisfaciendum* for the remainder of the debt, on which the defendant is in custody.

If an *elegit* be executed for part of the judgment on the goods of the defendant, and a *nihil* returned as to his lands, the plaintiff may have a *ca. sa.* for the remainder of the debt; for an *elegit*, on a *nihil* returned, is nothing more than a *feri facias*.

BRAINTHWAITE, *Serjeant*, shewed cause why the *capias ad satisfaciendum* should not be superseded, and the defendant discharged out of custody; and contended that an *elegit*, where no lands are returned, is no more than a *feri facias*; and cited the case of *Foster v. Jackson*, in *Hobart* (b).

S. C. Stra. 226.
19. Hen. 6. pl. 4.
Dyer, 162.
3. Co. 11.
F. N. B. 265.
Tidd's Pract.

WORKHOUSE *contra*. The words in *Hobart* are only *obiter*; and but the opinion of the reporter, not the point adjudged. Though an *elegit* be not returned, yet the party having made his election can have no execution after (b). An *elegit* is a writ of a much superior nature to a *feri facias* granted by statute; and if a person elect it, it is a remedy he must abide by. An *elegit* to hold *quousque* may be an expiring lease, and not satisfy the debt; yet no other execution lies after it.

755.

EYRE, *Justice*. If nothing come of the process on return, the party may have another execution; and this is no more than a *feri facias*. In *Foster v. Jackson* it was held, that the party may have another execution after a *capias ad satisfaciendum*, where the defendant died in prison, for that he had no fruit of his first execution. On execution, the cases that you shall not take out another, are when the first is effectual: it seems to be regular.

FORTESCUE, *Justice*. The question seems to be only, Whether one may take execution by *capias ad satisfaciendum* after *feri facias*? An *elegit* is only a *feri facias*, with the addition of land. The taking out of the writ is only in order to an election, and until the return he has none. If *nihil* is returned, the election is gone.

(a) Hob. 56.

(b) Dyer, 249. Year-Book 15. Hen. 7. pl. 15. 2. Inst. 395.

After,

BEACON
against
PECK.

After, in the same Term, THE WHOLE COURT were for the same reasons of an opinion that it was regular (a).

(a) See the same point determined accordingly in Michaelmas Term 13. Geo. 1. in the case of Lancaster v. Fielder, 2. Ld. Ray. 1451.

Case 403.

Tibbs against Clow.

The breach
must be as par-
ticular as the co-
venant.

ACTION OF DEBT ON BOND. On *oyer* craved of the condition. it appeared to be for the performance of covenants, and they are set forth with a *profert* in the plea.

The covenants were, that the defendant should deal with the plaintiff for, and the plaintiff should put into his cellar, beer, ale, stout amber-beer, amber-ale, and that at the time of the defendant's death or departure from the house, he was to account to the plaintiff for all liquors drawn in the house and not paid for: in the same articles it is agreed, that the defendant may deal with any other person for other liquors than above mentioned. The breach assigned was, that when he departed from the house, liquors to the value of thirty pounds were drawn and not paid for.

YORKE, for the defendant. It is necessary to assign a breach more specially in an action on a bond for performance, than on the covenants; in the last, it is sufficient to follow the words of the covenants. This covenant, to account for all liquors left, must be taken according to the subject matter, that is, for such liquors as the defendant was to deal with the plaintiff for. The assignment of the breach extends as well to the liquors for which the defendant might deal with others, as by the covenants it appears he might, and for those he was not accountable to the plaintiff. The assignment therefore is too general.

KETTLEBY contra. There is no *oyer* of the covenants, so as to appear to the Court *in hæc verba*, but are only set forth to the Court by pleading.

YORKE in reply. If we have not set it forth as it is, they should have shewn it; and it is not a particular clause *inter alia*, but the whole articles that are set forth.

EYRE, Justice. The liquors mentioned in the assignment of the breach are as well others as malt, for which, by the covenants, he might deal with others, therefore bad. If covenants are not truly set forth by party pleading them with a *profert*, the other must crave *oyer*, but cannot set forth any other covenant, and a breach in that covenant. On pleading covenants with a *profert*, if you proceed with out *oyer*, you admit the covenants to be as set forth. If there is a general covenant, it must be tied up to the subject matter. *The Royal African Company v. Muijon, 2. Saund. Arlington v. Merith.*

Powys,

POWYS, *Justice*, of the same opinion.

TIERB
against
CLOWE

FORTESCUE, *Justice*. The covenants are, that the plaintiff shall put liquors into the cellar; there is no where shewn he did so: It is said, that they must account at the time of departure from the house; and it does not shew when he went from the house.

PER CURIAM. We are agreed that judgment shall be for the defendant.

Guise *against* Ellis.

Case 404.

COVENANT.—That the defendant, his heirs, or assigns, shall set yearly so many crab-apples or pear-stocks. Assigned for breach, that the defendant did not.

Where the action is against the original lessee, the breach need not extend to assigns.

WEARG. The declaration shall be taken most strongly against the plaintiff: he should have alledged, that the defendant nor his assigns did not, for the lessee may have assigned. *Plow.* 195. *Cro. Eliz.* 348. *Bridgman*, 46. If an act is to be done to one, or his assigns, it is sufficient to shew it was not done to him; but when by him or assigns, it must be said neither by him nor assigns, 5. *Mod.* 133. *Salk.* 139.; for in the first, to the assignee is but to the order; in the last, assigns have the proper meaning in the law.

Strange, 228.
Salk. 139.

PROBIN *contra*. They have demurred generally, and not shewed this for cause. The action is brought against the lessee: if there was an assignment the defendant should have shewn it, but instead of that, demurring generally admits there was none. It is a matter which lies in the privity of the defendant, and not of the plaintiff; and that is the reason of *Bradshaw's Case*, in 9. *Co.* In the case in *Cro. Eliz.* the breach was in the conjunctive, but if it had not it would have been good.

WEARG *in reply*. They were privy to the covenant, and might assign the breach in the words of it, without knowing whether it was assigned or not.

POWYS, *Justice*. This declaration may be true, and yet the covenants may be performed.

EYRE, *Justice*. The interest and estate is supposed to remain where it was, unless the contrary appear. It is in the defendant's privity whether he has assigned or no.

FORTESCUE, *Justice*. I think it very well, and it would be absurd to be otherwise. The covenants charge the lessee; when he parts with the interest, the assignee; if the lessee dies, his heir: if his assigns have done it, he has. The case in 3. *Cro.* is, that they did not all do it. I think it very clear, and not worth considering.

PER CURIAM. Judgment was given for the plaintiff.

Hammond

Case 405.

Hammond against Rogers.

Covenant on articles, dated 30 September, assigning for breach, that the defendant "afterwards, and before the end of the term aforefaid, I "May," did, &c. is good.

AN ACTION OF COVENANT was brought on articles, dated the thirtieth of September, in the fifth year of George the First, in consideration of twenty-four pounds for a fine, to quit the shop and trade of a baker, and not to set up or use the trade within a mile for twenty-one years next after the date; and for breach it was assigned, that *postea et ante finem termini prædicti. viz. primo die Maii 1718*, he set up within a mile.

The defendant pleaded, that he did not, &c. *modo et formâ*. And a verdict was found for the plaintiff.

FAZAKERLY in arrest of judgment. The day they alledge the breach is the first of May 1718, the date of the articles is not till the thirtieth of September 1718, and therefore it is wrong; but if the day be rejected, then it is *postea* and before the end of the term; so that it does not appear for what time the damages were given.

REEVES. This cannot be taken to be an impossible day, and it is not to be rejected because of the word *postea*; if to be rejected, *postea* cannot exclude the date; so that he might trade that day, and yet no breach of the articles. The day under a *scilicet* is an averment.

DARNELL contra. Every thing, without which the plaintiff could not recover, must be presumed to have been proved at the trial.

EYRE, Justice. The issue was not upon the time, but whether the distance was within a mile.

DARNELL. We could not have had a verdict unless we had proved that after the date he exercised the trade; but it is well alledged, the day may be rejected, and it is sufficient to say that after the date of the articles he did exercise the trade.

REEVES in reply. In this case it is a special issue: The breach is, that he exercised the trade within the space of a mile: Plea, that he did not *modo et formâ*: then the distance only is in issue. A verdict cannot help it, where it appears on the face of the declaration that there is no breach. The common form is, *post confessionem articulo. prædicti.* and that would be much stronger than this case.

EYRE, Justice. If the "*scilicet*" is repugnant to the *postea* it is always rejected, and the *postea* stands, and no doubt about it: *postea* must always relate to a time mentioned before. The day of the date is the whole day, and then *postea* must be the day after. Where a breach is laid for a certain day, you can recover damages but for that only, and give evidence for no more; and so it is for a certain time; but in neither case are they tied up to that day or time, but may give evidence of any after the covenants and before the

the action brought. Therefore the judgment must be taken to be for all damages to the time of the action brought, and might be pleaded in bar to any action for a breach before this action brought. If it had been bad, it would certainly have been helped by verdict, for the issue certainly takes in the time by the *modo et formâ* as well as the distance.

HAMMOND
against
ROGERS.

FORTESCUE, *Justice*. In this case you can make no sense of the day under the *scilicet*, and then it must be rejected. As to the *postea*, it must mean after the day of the date of the articles. *Postea* always refers to a particular day, but in evidence you are not confined to it. If bad, it is helped by the verdict.

POWYS, *Justice*. It is good; and if it was not, it would be helped by the verdict.

EYRE, *Justice*. It would affect other cases too much to say this was helped by verdict.

PER CURIAM. Let the plaintiff take his judgment.

The Dean and Chapter of Westminster *against* Dr. Case 406.
Herbert.

COMYNS, *Serjeant*, shewed cause against a prohibition being issued to stop the spiritual court from proceeding on a libel against Dr. Herbert, for reading prayers, and performing divine service, and preaching, without having first obtained a licence from THE ORDINARY of the place; and he contended, that whether there is a canon or not for that purpose, is proper for the judgment of that court. The statute of 13. & 14. Car. 2. c. 4. s. 19. does not interpose in this case, for it only restrains lecturers from preaching without licence.

Quære. Whether the spiritual court can proceed against a clergyman for performing divine service and preaching without a licence from the bishop.

SERJEANT PENGELLY *contra*. On this libel they endeavour to draw the right of donation into question; "without having right" (says the libel) "to pray or ask a licence;" to this he must shew that he has a right to pray or ask a licence, which will draw the whole matter; so that they thereby make themselves judges in their own cause.

REEVES *on the same side*. It is a case within the act of parliament which extends to all persons that preach, &c. as well as to lecturers; and the act inflicts a penalty, by which means it takes away the jurisdiction of the spiritual court (a). They are attempting to punish us for not taking a licence from them to preach.

POWYS, *Justice*. It is proper to be determined on a declaration in prohibition.

EYRE, *Justice*. Of the same opinion, for that it has bore such a debate; for we ought to grant a prohibition unless, it appear that

(a) Jones, 131, 132. 2. Lev. 150. Smith v. Clerk, Cro. Eliz. 252.

THE DEAN
AND CHAPTER
OF WESTMIN-
STER
against

DR. HERBERT.

the ecclesiastical court had the jurisdiction. I cannot find any thing of this kind laid claim to by an ordinary jurisdiction; originally it was a trust lodged in *the bishop*. If it is a doubtful question, and not determined, a prohibition ought to go.

FORTESCUE, *Justice*, of the same opinion. In their court it is not incident to meddle with temporal affairs; but it is so to this court to examine into spiritual matters that are mixed with the temporal.

THE COURT. *Fiat prohibitio.*

HILARY

HILARY TERM,

The Sixth of George the First,

I N

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*Sir Lyttleton Powys, *Knt.*Sir Robert Eyre, *Knt.*Sir John Fortescue Aland, *Knt.*} *Justices.*Nicholas Lechmere, *Esq. Attorney General.*Sir William Thompson, *Knt. Solicitor General.*The King *against* Dobbins.

Case 407.

THIS was an indictment for a nuisance in not repairing the street in *Holborn* before BARNARD'S INN. A special verdict was found, that *Dobbins* had a lease of a shop, a back room, and a chamber over that part of *Barnard's Inn*, where he and his family lived; that the Society of *Barnard's Inn* have time out of mind paved the street, and set up the rails that are before the inn, as lessees of the inn.

Persons inhabiting houses belonging to *Barnard's Inn* are liable to an indictment for not repairing the pavement before their doors, although the Society have time out of mind paved the street.

RABY. The defendant is chargeable to the repairs of this street by the statute; if not, he is chargeable to part *ratione tenuræ* as one of the lessees of the inn, who have time out of mind used to repair. The statutes are 22. & 23. *Car.* 2. c. 17. s. 7. and 2. *Will. & Mary*, c. 8. s. 6. which are for repairing the streets in *London*. The statute of *Will. & Mary* says, "that all open streets, lanes, &c. shall be repaired, &c. at the cost of the householders inhabitants in such street, &c. and if unoccupied by the owners and proprietors." That is, every such owner, householder, &c. to repair, &c. the streets, &c. before his house, &c. so far as his wall or buildings extend to the middle of the street. It is found, that the defendant is an occupier of the tenement, and that his family lives in it. In 2. *Inst.* 702. an inhabitant is said to be *qui propriis manibus et sumptibus possidet et habet*. The proviso

THE KING
against
DOBBINS.

viso in the eighth section does not, in this case, exempt the defendant: it is, "that such antient streets which have by custom been repaired and paved by any other order or manner, shall be repaired and paved in such sort and manner, and by such persons as used to repair the same, under the penalty of the act." This is only in case where a street is provided for by custom or usage, or where an estate sufficient is settled to that purpose. The words of the proviso are designed to charge such only as are chargeable within the meaning and in the manner mentioned in the proviso. The statute of 22. & 23. Car. 2. c. 17. s. 7. says, "that assessments shall be as well on tenements, occupiers of houses, shops, &c. as upon the owners where no tenants;" so that the defendant is within the express words of this act. The defendant is also liable at common law *ratione tenuræ*; for if the inhabitants of *Barnard's Inn*, as lessees of the inn, are liable, he being one lessee is answerable for a share; and whoever is answerable for a share, is answerable to the public for the whole. 6. Mod. 150. Salk. 358. *Rex v. Watts*, Salk. 357.

DARNELL *contra*. Those cases are of bridges, which are guided by a particular act, therefore nothing can be drawn from them. It is out of all cases at common law, for the repair of the streets of *London* are directed by particular acts, and by them the defendant is not obliged. The Society are lessees of the whole inn, and it is shewn that they used to repair: it is found that there are rails which inclose a piece of ground before the inn; that there is an opening in those rails against the gate of the inn, but not against the shops; this land interposing between the shops and the street being out of repair, makes the Society liable for their ground, as this piece thus inclosed must be taken to lie contiguous.

PRATT, *Chief Justice*. The defendant is a householder here, and not merely an inhabitant; and then by the express words of the statute he is bound to repair, it being before his house: in my opinion there is no difficulty in this case.

POWYS, *Justice*. It depends wholly on the statute, and on that I am of opinion, that the defendant ought to repair.

EYRE, *Justice*. The defendant is liable by the statute as a householder, unless exempted by the proviso; and if he be, he is still liable as an under-lessee of the Society. The place railed is part of the street, and I do not know but that those rails are a trespass.

FORTESCUE, *Justice*. He is chargeable not only by the statute but by common law. Suppose all the inn was let out, must not the street be repaired?

THE COURT gave judgment for the king.

Caviller

Daviller against Herring.

Case 408.

A CASE was brought from *nisi prius* in an action of *trover* for an *Exchequer order*.

It was found, that the order was assigned *in blank* to the testator by one *Ainsworth*; that the testator died possessed of it; and that his servant by stealth got it, and delivered it to a broker, who sold it to one *Johnston*, who sold it in a fair manner, in *Exchange-Alley*, to the defendant *Herring*.

The property of goods stolen is changed by a *bonafide* purchase of them in *market overt* for a valuable consideration.

CHESSHIRE, Serjeant. An action of *trover* lies for the parchment on which the instrument is drawn, if not for the debt itself (a). Nothing appears to shew that the servant had any right to it, or came fairly by it. He who buys acts at his peril, for if there are ever so many removes, they do not take away the property. *Hale* in his *Pleas of the Crown* says (b), "If a thief steal from one man what he stole from another, he may be charged to have stolen it from the first and right owner." That they are assigned *in blank*, is the constant practice, and they are never filled up until brought to the *Exchequer* to be registered. They may have their action over against the wrong-doer.

REEVES contra. It is stated, that in the pocket-book of the testator was found a memorandum that he had this order: that does not prove that he had the possession of it, and then it does not appear but the servant might come by it honestly. The testator might have filled up the assignment *in blank*, and have had it entered in the *Exchequer*; and if the property is not in him until then, it was his *laches*. The *Exchange-Alley* is the *market overt* for these things; and then, notwithstanding the servant may have stolen it, the sale transfers the property to the vendee. I agree that the cases are, that felony does not divest property; but if bought in a *market overt* it does (c). This was so at common law, which 31. *Eliz.* c. 12. shews; for that says, "if they claim within six months." Before 21. *Hen.* 8. c. 11. if goods stolen were sold in *market overt* by the felon, yet there was no restitution, although he was convicted; but since that it has been held otherwise. *Moor*, 360. *Key*. 35. 48.

PRATT, Chief Justice. The absolute property of the money was in *Ainsworth*, until registered. The order itself may be assigned by parol, which is indorsed *in blank* to the intestate; he therefore and his administrator have a good title to the order. The servant getting it into his possession cannot give him a title. If *Exchange-Alley* is a *market overt*, it is not found to be so in the case; if it is so, it must be by custom, prescription, or letters patent: these things are often sold in other places than *Exchange-Alley*; and I do not see why the purchaser should not take as much care

(a) Co. Lit. 236. 3. Co. 33. *Dyer*, (c) 3. Co. 78. See also 3. *Hawk.* 50. 4. Mod. 156. P. C. ch. 23. s. 57.

(b) *Hale's P. C.* 64.

DAVILLER
against
HERRING.

in these things, to bring down a good title, as well as in case of land. All the inconveniencies would be prevented by due registering.

POWYS, *Justice*, entertained great doubts on this case.

EYRE, *Justice*. This is a thing proper to be considered. No one knows what passes between two brokers, therefore it does not come within the notion of a *market overt*. It was possible for the defendant, with proper caution, to have taken care to have a good title; but the plaintiff could by no means secure himself.

FORTESCUE, *Justice*. I think it clear that there is a plain property in the instrument. If it appear that the *Exchange-Alley* is the place chiefly used for selling these things, it goes far towards a *market overt*; and I think the law should comply, if possible, with trade; it has done so.

PRATT, *Chief Justice*. The courts could not go into the cases of promissory notes, but there was an act for it.

The parties consented to try the cause again; the case being very imperfectly found (a).

(a) The plaintiff was nonsuited on the second trial. S. C. Stra. 300.

Case 409.

The King against Furness.

On an appeal to sessions, if the right of tithes come in question the Court cannot proceed in the cause.

ON AFFIDAVIT read, that the right of tithes was in question when the cause was heard at the sessions upon an appeal, it was moved, that the *certiorari* and return might be filed.

REEVES *contra*. The affidavit not only says, that the right of tithes came in question, but also proceeds to shew what was meant by that, *viz.* that time immemorial they had not paid tithes for lambs proceeding from ewes but a year old. This is a prescription *de non decimando*, which is void; for all things are by right titheable, and a layman cannot prescribe *de non decimando*.

FAZAKERLY *in reply*. A particular place may be exempt from tithes for a particular matter (a), which is the present case. The statute 7. & 8. Will. 3. c. 6. s. 7. says, that no proceedings or judgment had by virtue of this act, shall be removed, &c. unless the title of the tithes come in question. This order is not made by virtue of that act, or according to it; for the act directs, that there must be a demand in writing twenty days before the justices have jurisdiction (b), and nothing of that appears on the order, nor how long the tithes have been due; and if this is not an order made by virtue of this act, a *certiorari* lies of common course to remove it without the affidavits.

(a) Dr. & Stud. 174. 2. Roll. Abr. 654. pl. 17.

(b) S. C. 1. Stra. 164.

REEVES.

REEVES. They are not now to take exceptions to the form of the order, but only to consider whether the return should be filed.

THE KING
against
FURNESS.

PRATT, *Chief Justice*. The only matter now is, Whether the right of tithes came in question at the sessions? Common right is against the defendant, but he says there is a custom for him; then, Whether or not this is a good custom? is a question of law; and that point has been doubted. In the case of *Hunsfield Puriton*, in Lord Chief Justice HOLT's time, a prescription *de non decimando* was not allowed for live cattle; and it is there said, that it was allowed good for wool only; and the reason given was, that tithes of wool are by custom, and not of common right: it is then a question in law not proper for the sessions to determine.

EYRE, *Justice*. The justices of the peace cannot judge of that matter.

FORTESCUE, *Justice*. It would be a good defence to the spiritual court, and a good ground for a prohibition; and I cannot think that the act was designed to give the court of sessions a larger jurisdiction than the spiritual court.

PER CURIAM, *absente* POWYS. Let the return be filed.

Turner against Brewer.

Case 410.

MR. REEVES moved to quash a writ of error, which was *ad grave damnum* of one defendant only, though the judgment is described in the writ to be against two.

In an action for a malicious prosecution against two defendants, one of them alone cannot bring a writ of error.

MR. STRANGE *contra*. When the judgment is joint, the parties may either join or sever in the writ of error (*a*). The heir alone may bring a writ of error of a judgment against the ancestor and another person. Summons and severance in a writ of error lies only when the parties come in on a *scire facias*.

S. C. Stra. 233.
3. Mod. 134.

REEVES *in reply*. It is an action upon the case for a malicious prosecution; the damages are joint and entire. If the judgment is to be reversed, it must be *in toto*; and it would be very odd that one who was not a party to the writ of error, should have advantage of the benefit of the reversal. In *Ruddock's Case* (*b*), it is adjudged that they must join, although the old Books seem otherwise. If one defendant die, the survivor may bring a writ of error; but there it must appear on record that one is dead. An infant may have a writ of error, and the judgment may be reversed only as to him. The late act does not aid this; that is only to make the writ agreeable to the record.

PRATT, *Chief Justice, absente*.

EYRE, *Justice*. The *damnum* in the writ of error is that alone which shews who brings it; therefore, as this is, it must be un-

(a) Bro. "Joinder in Account," 77. * Herne's Pleader, 77.

(b) 6. Co. 25.

TURNER
against
BREWER,

derstood that one alone has brought this writ, and I am of opinion that he cannot do it.

POWYS, *Justice*. Certainly one alone cannot bring this writ, *Ruddock's Case* is exprefs that he cannot.

FORTESCUE, *Justice*. Where damages are joint, they must join; but where they are separate, they may divide in a writ of error.

EYRE, *Justice*. In the case of *Pennoyer v. Brace* (a), in the latter end of *King William's* time, a writ of error was quashed for this cause.

THE COURT quashed the writ (b).

(a) 1. *Ld. Ray.* 444. *S. C. Salk.* 319. *v. Burton*, B. R. H. 135. *Lady Cais v.*
S. C. 12. Mod. 130. *S. C. 5. Mod.* 338. *Title, Stra.* 682. *Rex v. All Saints, in*
See also, 1. *Wilf.* 302. *Dougl.* 637. *Derby, Stra.* 1110. *Frescobaldi v.*
(b) See *Herne v. Herne*, *Carth.* 7. *Knyfston, Stra.* 783. *Vavafour v. Vaux,*
Burr v. Atwood, 1. *Ld. Ray.* 328. 1. *Wilf.* 88. *Knox v. Costello*, 3. *Burr.*
Rouse v. Etherington, 2. *Ld. Ray.* 870. 1792. *Laroche v. Walsborough*, 2. *Term*
Cooper v. Ginger, *Stra.* 606. *Ratcliffe Rep.* 738.

Case 411.

Memorandum.

IN this Vacation MR. YORKE was made *Solicitor General*,

EASTER

E A S T E R T E R M,

The Sixth of George the First,

I N

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*Sir Lyttleton Powys, *Knt.*Sir Robert Eyre, *Knt.*Sir John Fortescue Aland, *Knt.*Sir Robert Raymond, *Knt. Attorney General.*Philip Yorke, *Esq. Solicitor General.*} *Justices.*

Poole against The Hundred of Flitt.

Case 412.

THIS was an action against the hundred of *Flitt*, in *Bedfordshire*, for a sum the plaintiff had been robbed of, and the jury found a verdict for the plaintiff. But it was moved in arrest of judgment. And

Declaration on the statutes of Hue and Cry against the hundred.

THE FIRST EXCEPTION was, That the robbery is said to have been committed "*in com. prædict.*" and the last county mentioned was *Middlesex*, so that it is not said to have been done in *Bedfordshire*.

THE SECOND EXCEPTION was, That the lane wherein the robbery was committed is not said to be the king's highway; they must be robberies which in their own sense include the action done in the highway. 1. *Saund.* 376.

RABY *contra.* AS TO THE FIRST EXCEPTION, The beginning of the declaration is against *omnes homines* of the hundred of *Flitt* in the said county, and "*Bedford ss.*" is in the margin, which is in the county of *Bedford*: it afterwards says, that he was robbed in ——— Lane in the said hundred of *Flitt*, which must be in *Bedfordshire*.

POOLE
against
THE
HUNDRED OF
FLITT.

AS TO THE SECOND EXCEPTION, It is the common form; the case in *Saunders* only shews that it would not be bad the other way.

Of this opinion, in both points, was THE COURT; and therefore

Judgment was given for the plaintiff.

Cafe 413.

The King against Nichols and Radcliff.

In what case the Court will grant an information *quo warranto* for usurping a power, although it was no prior franchise in the Crown.

S. G. Stra. 299.

REEVES moved for an information, in the nature of a *quo warranto*, against the defendants *Nichols* and *Radcliff*, for executing the office of trustees of the harbour of *Whitehaven*. It is a public harbour for all ships, and being in decay for want of repair, it was regulated by the statute 7. Ann. c. 26. by which trustees were appointed to collect the duties assessed for such repair. They were appointed after this manner: the lord of the manor was to chuse seven, and fourteen more were appointed by name in the statute for seven years; and if any died within that time, the remainder of the fourteen were to chuse new ones. At the end of the seven years, the inhabitants of the place were to chuse fourteen for three years; but the statute gives no power to the remainder of this fourteen to fill up vacancies by death; and these two gentlemen were chosen by twelve to fill up the place of two dead. That this relates to the public is evident, for these trustees have a power of making by-laws, and of levying money upon the town for the repairs; and if these two be unduly chosen, the acts of the rest will be invalid.

FAZAKERLY. I am to shew cause against this rule for an information, in the nature of a *quo warranto*, against the two defendants, for acting as trustees of the harbour of *Whitehaven*.

In the year 1716 there was an election, and in last *August* there was another election; since which two of the trustees died, and the twelve surviving trustees have chosen two new ones, the defendants. And the question is, Whether these be well elected? that is, Whether it be such a franchise as an information will lie for the usurpation of? There is no instance, that I know of, of an information in the nature of a *quo warranto* against private trustees. This power of electing new trustees to supply vacancies must be within the intention of the statute; for else it gives *Mr. Lowther* such a power as will not be convenient. *Mr. Lowther*, lord of the manor, and seventeen more trustees are requisite to make by-laws, and to make any alteration in the harbour; now if four die, the statute will be ineffectual as to the purposes. It seems questionable, Whether the power of chusing new trustees to supply vacancies, which was allowed to the first fourteen, does not run through the whole? and there is the same reason. If it be a franchise, it is a necessary incident to them as such; and they may by

by common law supply such vacancies, though no such express power was allowed them at their constitution.

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DENTON *in reply*. This was made a public harbour by the statute 7. *Ann.* A considerable revenue arises from it to THE KING: the statute makes eleven of the trustees a *quorum*, and presumes that there will be no need of electing new ones oftener than once in three years. That it is of such a public nature that an information will lie against it, is apparent.

REEVES.—As to the nature of the office, The matter concerning which they are trustees, is of as public nature as can be, and their power is so too; for they may make by-laws concerning the harbour, assess money upon the inhabitants, appoint a public officer, and administer an oath to him. The manner of the election being appointed by the statute, no election can be good but what pursues it. When the fourteen were appointed by name in the statute, for seven years, it was reasonable to allow them to supply defects; and if it had been the intention of the parliament to allow such a power afterwards, there could have been a clause for it. Where a corporation is constituted by charter, and no power of filling up vacancies allowed by that charter, they have it by common law; but where the method of the election is prescribed by the charter, they must pursue it.

BOOTLE. If such a power of electing new ones became necessary, it would be rather in the inhabitants than in the surviving trustees. In the case of *The King v. Stanton* it is doubted, whether an information would lie against one for holding a court-baron: as to a court-leet it was not doubted; but the Court held that it would lie for holding a court-baron. If a statute contains anything that relates to the revenue of the Crown, that makes it a public law (a).

PRATT, *Chief Justice*. By common law all ports are in THE CROWN: a subject, indeed, by prescription may be entitled to a port. The statute has appointed how this port is to be regulated, and if any one acts otherwise than as the statute has directed, it is an usurpation on the Crown: the statute makes this to be of a public nature, and so it is by common law, and an information will lie against them. The court-leet and court-baron are derived from THE CROWN, and for that reason an information will lie against them. Corporations may preserve themselves, yet they must pursue their charter; and for that reason we rather suffer corporations to be dissolved, than to authorize their infringements on their charters. These two are not duly elected; and if any danger arises, they must apply to the parliament. The information ought to go.

POWYS, *Justice*, I am of the same opinion.

(a) *Holland's Case*, Cro. Eliz. 605.

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EYRE, *Justice*. They are not well elected, for the survivors have no power to elect them. We cannot supply a power; and it is plain the statute never intended they should have such a power, for they have granted it in one case and not in the other. An information ought to be, because it is a public trust. It is the same case whether the king could grant such a power or no, as in this case he could not. There is reason enough for an information; and this cannot be determined otherwise.

FORTESCUE, *Justice*. An information ought to be granted; for it is a matter of right, and there is no remedy. This is matter of more consequence than what most informations are granted for. Informations are granted where it is not a franchise; though all ports being in the Crown by common law, though this power is enlarged by the statute, yet what the Crown had is granted, and so it is a franchise. It is plain the statute intended to vest no such power in them; for it is a known rule, that in statutes making a new law, an affirmative implies a negative of whatever is not affirmed.

An information was granted (a).

(a) Rex v. Boyles, 2. Stra. 836. Rep. 93. Rex v. Marsden, 3. Burr. Rex v. Reynel, 2. Stra. 1161. Rex v. 1813. Rex v. Wallis and Barrs, Williams, 1. Burr. 402. S. C. 1. Bl. 5. Term Rep. 375.

Case 414.

Roberts against Hamilton.

Form of declaration on a special *assumpsit*.

THIS WAS AN ACTION UPON THE CASE. In the first count the plaintiff declared, "THAT WHEREAS he had delivered a gelding to the defendant, the defendant promised to deliver two barrels of gunpowder, value three pounds fifteen shillings each." The other two counts were, FIRST, An *indebitatus assumpsit*; and, SECONDLY, A *quantum meruit* for the gelding. A verdict was found for the plaintiff on the first count; and for the defendant on the two last counts.

GIRDLER, *in arrest of judgment*, moved, that the declaration does not shew that the gunpowder was not delivered, but only concludes, as all common declarations do, that "by reason thereof, and according to the promise and undertaking of the said Hamilton so made as aforesaid, he, the said Hamilton, then and there became liable to pay, &c."

IT WAS ANSWERED, that by these general words must be intended that the gunpowder was not delivered; especially since it is after a verdict, which gives damages for the not delivering of it.

BUT PER CURIAM, It being a special collateral matter, the non-performance of it ought to be especially shewn in the declaration.

The judgment was arrested.

The

The King *against* Townsend.

Case 415.

TOWNSEND was committed for saying mafs,

A person committed for saying mafs intitled to be bailed.

DARNELL, *Serjeant*, moved to bail him, the statute only making it a great misdemeanor.

THE ATTORNEY GENERAL opposed it, for that to let such a person go abroad was as dangerous and pernicious to the public as permitting a highwayman to be bailed.

But PER CURIAM, It being only a misdemeanor, he was bailed himself in a thousand pounds, the bails each in five hundred pounds,

Saville *against* Saville.

Case 416.

In the Court of Chancery.

THE CASE having been argued before Lord Chancellor PARKER, assisted by SIR JOSEPH JEKYLL, *Master of the Rolls*, SIR JOHN PRATT, *Chief Justice* of the king's bench, SIR PETER KING and Mr. Justice TRACY, and standing this day for the opinion of the Court, SIR PETER KING opened the case with his opinion.

Where double portions are given to daughters, the less portion certain and the greater on a contingency, which happens after the less portion is paid, yet the daughters are intitled to the subsequent provision.

This is a bill brought against *Sir George Saville*, to have the execution of the term of five hundred years created in the marriage-settlement of *William late Marquis of Halifax*; the trust of which was for raising the sum of twenty-five thousand pounds for daughters portions. Upon hearing of the case it was referred to THE MASTER to examine; upon whose report the case appears to be thus: *George Lord Halifax*, father of *William Lord Ealand*, upon the marriage of his said son with *Lady Mary Finch*, daughter of the *Earl of Nottingham*, on the twentieth of February 1694, settled great part of his estate, subject to the incumbrances and annuities thereon charged, to himself for ninety years, if he should so long live, remainder to *Lord William* for ninety years if he so long live, remainder to *Lady Mary* for life, remainder to the first and every other son in tail male, remainder to trustees for five hundred years for daughters portions, remainder to the right heirs of *Marquis George*. The trust of the said term of five hundred years, is declared to be for raising portions for the daughters of that marriage, if there happen to be no son, viz. if more than one, to raise the sum of twenty-five thousand pounds in the whole, to be paid between and amongst them, at her or their age of sixteen, or day or days of marriage; and until such portions so become payable, to raise and pay the sum of two hundred pounds *per annum*, until they come to the age of twelve years, and then three hundred pounds, for their maintenance and education; subject to these provisos, that in case one or more such daughter die, her share shall be divided to and amongst the survivor and survivors; and to this,

S. C. 2. Atk. 458.
S. C. 2. Eq. Ab. 646.

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this, on which the question arises, "PROVIDED ALWAYS, and it is hereby further declared and agreed, by and between all and every the said parties to these presents, that in case there shall be no such daughter or daughters, or in case the said sum or sums of money and all maintenance in the mean time shall be raised; or in case the said daughter shall be advanced in marriage by the said *William Lord Ealand*, with the like portion or greater; or in case lands or tenements of an estate of inheritance shall descend to the said daughters, of as great value, to be sold, as the portions hereby intended, or so far as the said lands so left, to descend and come, shall go in value, that the term shall be utterly void." Soon after *Marquis George*, the first of May 1694, reciting this marriage settlement, and that the remainder in fee of the lands there settled was vested in him, makes a further limitation of the inheritance of these premises to the defendant, *Sir George Saville*, now tenant in possession thereof; so that the whole dispute is between him and the daughters of that marriage; for the *Marquisses George* and *William* are both dead, and there is, no issue male of that marriage, and but only three daughters. *Marquis William*, by a former venter, left one daughter, the *Lady Bruce*. By THE MASTER's report there are several other deeds (which need not be mentioned), by which it appears, that *Marquis George* was seised of an estate-tail which descended to his son *William*, and from him to his daughters; and that the reversion of another estate-tail descended to the same daughters, expectant on the death of the *Lady Stanhope*. *William Lord Ealand*, by his will, devised further portions to his daughters, and some other estates. THE PRINCIPAL QUESTION is, Whether any lands or tenements of an estate of inheritance are come to the daughters from their father, *William Lord Ealand*, according to the words and meaning of the proviso in the said marriage-settlement? Before I deliver my opinion thereon, there is one point or circumstance arising in this case which is necessary to be first spoken to: If lands of an estate of inheritance, within the meaning of the proviso, are descended to the daughters, in consideration of which there ought to be a *recouper* or cesser of the portions, or part of the portions intended to be raised by virtue of the term, whether the valuation of the land so descended is to be computed at the time of the descent, or when the portions are made payable? for in this case, when the lands descended, that is, when the *Marquis William* died, they were charged with several annuities and incumbrances, which were determined before the portions became payable, either by effluxion of time or decease of the annuitants. And I AM OF OPINION, that the time of the descent is the time of the valuation: the words of the proviso intimate as much, for thereby it is declared, that if lands or tenements, &c. shall descend to the daughters, that then the term shall be void; so that it is plain the estate and term of years is to determine upon the contingency that lands of as great value descend; and consequently the time of the descent must be the time of the valuation. The portion, and the recompence for the

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the portion, cannot both subsist at the same time, for the one is the consequence of the other : and as the words of the proviso require this construction, so is it founded upon reason ; for the daughters, by virtue of the term, are entitled to a maintenance until the portions become payable, which is appointed in lieu of interest, for when the portions become payable the maintenance ceases. So when lands descend as an equivalent, proportionably to the value of the lands so descended, the maintenance must cease ; which also proves that the value of the lands is to be computed at the descent : besides, if the contrary is to be admitted, and the daughters enter into the land descended, they *volentes volentes* will be accountable for the profit ; and the question will be, Whether the account must be made in succession as each daughter comes of age or is intitled to her portion, or made with them all together ? so that the eldest daughter may be obliged to stay until the youngest comes to age. The lands, which must be equivalent to the portion according to the intent of the proviso, must descend, or be left to descend from the father to the three daughters. In the last part of the proviso there are the words " descend or come," which has been objected to conclude lands coming to the daughters by purchase ; but I AM OF OPINION, that the words " descend or come" will have the same signification. Descent is a known term in the law, and a particular method by which a person is entitled to land ; as when the ancestor dies seised of the land without doing any act to break or hinder the descent of it to the heir. It is not reasonable that an estate which the father gives to his daughters as an act of bounty or kindness should diminish the portions provided for them by the settlement, or should be instrumental to lessen a charge wherewith a third person's estate is incumbered ; and consequently, whatever the daughters claim by the will of the father can never be looked upon as an equivalent ; the words of the proviso being, " if any lands or tenements of an estate of inheritance shall, &c." Some have taken a difference between the expression " lands and tenements of an estate of inheritance," and " an estate of inheritance in lands and tenements ;" which I take to be too great a nicety, though they are in fact two different propositions : An estate of inheritance, in common understanding, is a fee-simple ; besides, the value of the lands to be sold is the value of the estate in them. It has been admitted by those who have argued for the most liberal construction of the words, that there are several sorts of inheritances that are not within the meaning of the proviso ; so that there must be some confinement of the general words in point of construction ; for the descent of a reversion in fee, expectant upon an estate-tail, can never be an equivalent for the portions intended for the daughters within the intent of the proviso, for it would not be assents to charge an heir in an action of debt at common law ; therefore the words must be understood *secundum subjectam materiam*, and according to the intention of the parties. There are but three sorts of estates, viz. of inheritance, in possession, or in expectancy. I AM OF OPINION,

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OPINION, that whatever estate, of a pure and absolute fee, descends to the daughter may be looked upon as an equivalent, even though the estate in fee is subject to any the longest term of years, raised for a particular purpose, as the payment of a sum of money, yet it will be computed as assets in possession, the term amounting only to a charge upon the estate. As to the estate-tail in possession, as this case is circumstantiated, it cannot be esteemed as a satisfaction to the daughters for their portions; for it will not descend to the three daughters, simply and solely, as heirs to the body of the father, but also to them and their half-sister, *Lady Ann Bruce*, as four coparceners. I will not say that an estate-tail can never in such case be deemed assets; for had an estate been limited in special tail to *Marquis William* and the heirs of his body by his second *feme*, remainder to him in fee, the descent of such an entail might be assets; but it is not necessary for me to give any positive opinion thereon, because it is not the case before the Court. I shall only say in general, that admitting some exceptions, estates-tail are not within the meaning of this proviso; for lands of inheritance, according to the common understanding thereof, are lands in fee: as where one devises an estate of inheritance in such lands, or covenants to convey the inheritance of such lands, the fees of the lands are always intended. Lands of inheritance to be sold, must imply such lands as immediately upon the descent, without doing any other act, were valuable to be sold. Now lands entailed are not, for though they may be valuable, yet they cannot be immediately sold without doing some act: if they come to an infant, it is not in his power to make them so until full age, and then he must levy a fine or suffer a recovery; and in such case the descent itself does not make the value, which it must to come within the meaning of the proviso. Estates-tail were created to preserve the bounty of the donor to the donee and his issue, and the issue do not claim merely by descent from the donee, but by reason of the munificence of the donor through the donee; for which reason, before the statute 26. *Hen. 8. c. 13.* an estate-tail was not forfeited for treason, but the issue might claim the estate, notwithstanding the attainder of the donee. No one can think that the donee gave this estate to the *Marquis William*, that the daughters portions might go to another person. The estate of inheritance which must descend to the daughters, to be an equivalent for their portions, must have the same qualities as the portions it comes in lieu of, for the satisfaction must always follow the nature of the thing satisfied. The daughters, at their age of sixteen, or marriage, have an absolute power over their fortunes, and consequently ought to have the same over the estate which comes in lieu of them. If I owe one hundred pounds and devise to my creditor that sum, the devise shall be a satisfaction for the debt, but not so if given on a contingency or condition. By the statute of *Gloucester, c. 3.* alienation of lands held by tenant by the curtesy, shall not bar the heir, unless he has assets in lands of inheritance by descent from his father; the construction of which statute has always

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always been, that lands and tenements of inheritance in fee must descend to the heir, or else he is not barred by the alienation and warranty of his father. For though the word "heritage" is general, yet it hath in construction a special signification; for the assents must respect the essential quality of the inheritance whereof the heir is to be barred; and that the descent of an estate-tail was not assents, for it ought to have been a fee. Besides, the estate-tail in the case at bar is a particular one so attended as not to be construed within the proviso. By the deed, the portions are payable at sixteen, or day of marriage; and it is provided, that if any of the daughters die, her share shall go to the survivor; so that if one only live to full age, she will be entitled to the full twenty-five thousand pounds: in this case the *Lady Ann Bruce* becomes coparcener of this estate; and consequently, if she survive, the whole estate comes to her, which is directly contrary to the proviso. Now a fee in possession would descend to the whole blood, which an entail does not. The argument, that the *Lady Ann* may die first and so her part survive to them, is not sufficient; for an equivalent must be certain, and not depend upon any accidental contingency. As to the reversionary estate-tail expectant on the death of the *Lady Halifax*, everything said against an estate-tail in general will be good against a reversionary estate, with this further consideration: The term of five hundred years is created as well to provide maintenance for the daughters as portions; and from these reversionary estates yielding no present profit, no maintenance can be raised. Besides, should these daughters marry, their husbands can do nothing to these estates; no fine can be levied, nor recovery suffered for want of the freehold, nor can the husband be tenant by the curtesy. So that I am clearly of opinion, that these estates are not, within the proviso, such an estate of inheritance as can be accounted an equivalent.

As to the question, Whether *Sir George Saville* shall be accountable for the profits, or the timber cut down, he being tenant in possession, without impeachment of waste? I AM OF OPINION that he is accountable for neither; for the demandants come before the Court only for their portions.

SIR JOSEPH JEKYLL, *Master of the Rolls*. The proviso in this case, upon which the question arises, is conceived in very unusual terms. It is provided, that if all the daughters die, or are advanced in marriage, or have an equivalent, the term shall be utterly void. The general and more proper way is, that the term be conveyed over to the person or persons to whom the next and immediate reversion or remainder shall belong; if there is a particular equivalent or satisfaction, by descent of an estate of inheritance, the term *pro tanto* to cease, and the residue of the portions only to be raised. I mention this matter, because I take the question now depending to be rather a matter of law than equity, Whether the term of five hundred years is satisfied or no? It depends on the construction of the condition or contingencies contained in the proviso: if they have happened,

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happened, the term is ceased and void; if not, it continues; for if the term cease, the trust of the term must by consequence do so too, and so *à contra*: this removes the authority of many of the cases that have been cited at the bar, which relate only to equity. I agree, that this Court inclines strongly against giving children double portions, in order thereby to prevent the double charging of men's estates. In the case of *Kemish v. Thomas*, which was decreed on the ninth of *March* 1697, it was said by LORD SOMERS, that it is not enough to say, that, where portions are provided for children by one deed, and afterwards, by another deed, the father further provides for them, the second provision shall go as part of the first portion, though there is nothing expressed in the second deed that it was intended as a satisfaction; for unless the deed shew expressly that it was intended as an additional portion, the presumption is that it was in satisfaction and in lieu thereof, for family estates shall not be doubly charged. In that case, by two settlements different sums of money were appointed; they were limited to be raised on different estates, the times of payment different, and different the provision for the children until they came to age; by the second there was an augmentation of the jointure of the wife provided for her by the first; from whence it was argued to be the intention of the father, as well to increase the provision for the children as the jointure of the wife: yet it was decreed, that only one of the portions should be raised; for the intention of double portions must be express, the presumption being on the contrary side, that the estates shall not be twice charged. There were but two cases cited at the bar necessary to be here mentioned; one was *Duffield v. Smith*, in the third year of *William and Mary*, in chancery: *Knightly*, on his marriage, covenanted to stand seised of his lands to himself for life, to his wife for life, remainder to his first and every other son in tail male, remainder to all and every daughter of that marriage, until the next heir should pay to and amongst them the sum of three thousand pounds; he afterwards died, leaving a son and two daughters, and devised by his will, amongst several other legacies, to his eldest daughter seven hundred pounds, and to his youngest six hundred pounds; and devised to his son all his estate, upon trust to sell to satisfy his legacies; and afterwards the son, by his will, devises the estate to his uncle, being heir-male of the family in tail, remainder over; and gave all the residue of his estate, real and personal, to his two sisters: which *residuum* amounted to no more than the value of the three thousand pounds provided for the daughters by the marriage-settlement. After the son's death the daughters brought their bill to recover the three thousand pounds provided for them by the settlement; but it was dismissed, because the daughters title was at common law to the land; the limitation being to all and every daughter, until the next heir paid them three thousand pounds. But afterwards, the twenty-fifth of *October*, 4. *Will.* the uncle preferred his bill for relief, suggesting that the thirteen hundred pounds given to the daughters by their father's will, ought to go in part of satisfaction for the three thousand pounds, and the residuary

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residuary devise by the son, amounting to more than the value of three thousand pounds, ought to be esteemed a full equivalent for the same portion; of this opinion was THE LORD CHANCELLOR, and decreed that the daughters should convey the estate to their uncle accordingly; but this decree was afterwards reversed in THE HOUSE OF LORDS, and consequently the daughters had as well the portions provided for them by the settlement, as the thirteen hundred pounds devised by the father, and the residuary devise by the son. This, though it has some resemblance to the case at bar, is different.—The other was *Hillcox v. Hillcox*, cited by name in *Lane's Case*, Trin. 1706, the first Term when the seals were delivered to the LORD COWPER: one covenanted to settle land to the use of himself for life, remainder to his first son in tail, with several remainders over; he did not settle any lands, but died seised in fee of lands of two hundred pounds *per annum*; and it was decreed, that the lands so descended, should be accounted as an equivalent for lands so covenanted to be settled, for this invincible reason, that the son had a better estate in the lands so descended than he could have had in the lands to be entailed, and consequently were more valuable; but the Court, for the benefit and advantage of those in remainder, ordered the son to settle the lands so descended to the same uses that the lands were covenanted to be settled to.

THE FIRST QUESTION in the case at bar is, What lands coming to the daughters, by act of the father, can be esteemed an equivalent according to the proviso? In the first place, where the value of the land is mentioned, the word "descend" is only used; where it is provided for lands of less value, the words are, "left to descend;" and in the last place, which makes this question, it is said, "so left to descend or come." I AM OF OPINION, that the last words are relative, and by reason of the word "so" are relative, and refer to the place where "descend" is only used; however "come" and "descend" are synonymous terms; "left to descend," is no more than "permitted to descend," when the descent is not broke by devise or other act; for the proviso could never intend to exclude the bounty of *Lord William* to his daughters: So that I think such land only as descends from *Lord William* can be construed to be within the proviso. The value of the lands is to be made at the time when the portions are to cease, wholly or *pro tanto*, that is, at the descent of the land. An estate-tail is an estate of inheritance, and is descendible (a), and at common law was a fee, and the whole estate was in him; and the issue, though said to claim *per formam doni*, yet claim as issue, and not by purchase. But the rule in *Gregory's Case*, in *Coke's Sixth Report*, that *verba equivoca* shall be taken in *digniori sensu*, generally holds good. If lands in tail will secure to them their portion, in the same manner they are an equivalent, or else not (b). Now in the money they have an absolute fee; in the lands, an entail: the money they may dispose of in their minority, and by will; of

(a) Co. Lit. 9. a.

(b) Vernon's Case, 4. Co. 1.

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the entailed land they cannot. The difference between this and an exchange is only, that in the latter the parties contract for themselves, in this the father for the daughters; and if on exchange they cannot contract for want of like estates, it would be absurd that they could do so in this. This estate-tail in possession is not therefore an equivalent. Then nothing is to be said for an estate-tail in reversion.

PRATT, *Chief Justice*. The intent of the proviso is, that the daughters shall have twenty-five thousand pounds for their portions, and that it shall come to them from their father, my Lord Ealand, as appears throughout the whole marriage-settlement. The Lord Ealand had an estate-tail made to him by his father *Marguis George*; this provision is then by their grandfather, and not the father, as it is directed to be by the marriage-settlement. Though the issue in tail claims through the father, yet it is *per formam doni*, and he has as good a title as his father had, and his father could not charge it. If my Lord Ealand had reduced the estate into a fee, it would have been an equivalent, but it must never be considered as such until made so. The estate that was to descend from the father was to be an estate of value to be sold, and estate-tail while such cannot be valued; it was not the intent of the parties that it should be sold, but only that it should be valued as if it was to be sold. An estate-tail can no way answer in quality the portions to be paid.

PARKER, *Lord Chancellor*. MR. JUSTICE TRACY has sent me his opinion (a), but desired me not to read it in court: It is in general, that there is no equivalent; that the lands are to be valued at the time of the descent; and, that none of the estates are within the meaning of the proviso. I AM OF THE SAME OPINION; for the reasons given must convince anybody. An estate-tail is no equivalent for twenty-five thousand pounds, the security of which is the main design. Infancy being a legal disability, in case the estate was fee, it might be removed by act of parliament to make a marriage-settlement; but in case of an estate-tail it will not, because others in remainder and reversion are concerned. They may reduce the entail into a fee, but not before they come to age, which is a chance that they may. A devise to one, generally, is but for life; but a devise upon condition to pay money, though but ten pounds, and the estate is one hundred pounds *per annum*, is a fee; because if he should pay the ten pounds, and have but an estate for life, by chance he may lose by it; and the law will not put a man to run any hazard or chance. Then it must be an estate of value to be sold. Estates in fee have their value in them, but an estate-tail has not. The intent of the marriage-contract was to secure so much certain to the daughters, and not to prevent anything farther that the father should please to do for them.

And there was a decree accordingly.

(a) See this opinion *verbatim*, 2. Atk. 461.

Hobbeſy againſt Thornhill.

Caſe 417.

AN ACTION againſt an executor of an adminiſtrator for a debt due by the inteſtate.

An action againſt an executor of an adminiſtrator, ſtating that he had converted the goods of the inteſtate to his own uſe, is ſufficient.

An exception was taken to the declaration, that it does not ſhew a ſufficient waſting to intitle the plaintiff to this action by virtue of 30. Car. 2. c. 7. it is only ſaid, that *in uſum ſuum proprium convertit*. In *Saunders*, 308. it is *vendidit et in uſum ſuum proprium convertit, ita quod execution fieri non poterit*, and held bad; the ſame of *elongavit et in uſum ſuum proprium convertit*, 2. *Saund.* 403. and the reaſon is, for that the defendant might convert to his own uſe juſtly, for a debt due to him from the inteſtate.

PRATT, Chief Juſtice. The declaration is in the very words of the act, and is *primâ facie* well enough, and intends a waſting; if there is anything in the defendant's caſe to ſhew there was no waſting, he ought to ſet it forth.

EYRE, Juſtice. It is the intent of the act, that the executor or adminiſtrator ſhall be anſwerable for what remains in his hands, though not waſted or converted to his own uſe. The caſe cited is, where they ſued an executor to have judgment *de bonis propriis* upon a *devaſtavit*.

FORTESCUE, Juſtice. The declaration is good to a common intent, and therefore well. It is true, that an executor may retain to his own uſe for a debt due to him; but *primâ facie*, or to a common intent, a conversion is a *devaſtavit*.

Judgment was given for the plaintiff.

Anonymous.

Caſe 418.

ON reference to THE MASTER to enquire into the irregularity of proceſs upon a *ſcire facias* againſt bail, the judgment was by conſent of the defendant *ita quod ceſſet executio* until ſuch a day; before which day the plaintiff's attorney ſued out a *capias ad ſatisfaciendum* to charge the bail, and had it returned *non eſt inventus*.

A *ca. ſa.* cannot be taken out againſt bail, pending a *ceſſet executio* againſt the principal.

PER CURIAM. They cannot take out a *capias ad ſatisfaciendum* to charge the bail during the *ceſſet executio*.

And all proceedings were ſet aſide.

In this caſe it became a queſtion, Whether, during the *ceſſet executio*, a *teſtatum capias ad ſatisfaciendum* in order to have execution in another county, may be ſued out?

The Maſter ſaid it might; but THE COURT was ſilent as to that, it not being before them.

Case 419.

Reed *against* Rew.

Declaration in
assumpsit for
boarding an in-
fant.

1. Will. 241.
3. Will. 388.
2. Bl. Rep. 872.

INDEBITATUS ASSUMPSIT for boarding the defendant's child, an infant. It was objected, that an *assumpsit* did not lie for it; and 1. *Vent.* 268. 293. *Salk.* 23. were cited.

PRATT, Chief Justice. In those cases the goods were sold to the son, and the father *assumpsit* for them. But this is sufficient to ground an *assumpsit*, and need not be laid in an action upon the case; for this is at the defendant's request and credit that the plaintiff provides boarding for the defendant's child, an infant.

Judgment for the plaintiff.

Case 420.

Nicholson *against* Simpson.

In pleading,
whatever is ma-
terially alleged
and not traversed
is admitted.

- S. C. Stra. 297.
S. C. Fort. 356.

ACTION ON A BOND, conditioned to pay the costs on an affirmation of a conviction of deer-stealing. After *oyer* of the condition, and it being set forth *in hæc verba*, the defendant pleads, that the conviction was never affirmed. The plaintiff replied, that it was affirmed. Demurrer and joinder.

MR. CONINGSBY. In the conviction, the killing is said to be in ——— *Chase*; in the condition, it is said to be in *Winnerick Ground*. In the condition it is said to be done on or about the third of *August*; the conviction says, between the last day of *July* and the sixth of *August*. But the differences, if material, are helped by averments in the replication, that *Winnerick Ground* is part of the *Chase*, and the same ground as is mentioned in the conviction; that the time is the same; that it is the same killing; and that the defendant was never convicted of killing deer except that time. Such averments may be made, 4. *Co.* 71. 8. *Co.* 155. 11. *Edw.* 4. c. 2. *Cro. Car.* 320. 501. Where the things can possibly be the same, an averment of identity helps these variances. 2. *Lut.* 1414. 1419. 3. *Lev.* 179. If these averments are true, they may be traversed; if they are not traversed, they are admitted. 2. *Vent.* 170.

MR. AGAR contra. The variance is material, for a particular place in the *Chase*, and in the *Chase* at large, are quite different. They do not in the replication assign any breach of the condition. When a person is to do an act subsequent to another, and the defendant pleads the first act not done, the replication, that it was done, must go on and shew a breach in the non-performance of the second act. As if there be a plea of no award; the replication, that there is an award, must go on and shew that it is not complied with (a). 1. *Saund.* 102. Indeed, where the plea admits the fact, and pleads an excuse, as a release, the replication need not go any farther. 1. *Salk.* 138.

MR. CONINGSBY in reply. Pleading a collateral matter admits a breach.

(a) See *The Attorney-General v. Elliston*, 1. *Stra.* 191.

PRATT,

PRATT, *Chief Justice*. The averments are of a matter of fact consistent with the conviction then to be allowed. If they had assigned a breach, you could not take advantage of it, for it would have been a departure from the plea. A collateral matter pleaded, puts the event of the cause upon that. To be obliged to assign a breach, is only in case of an award; and that stands upon this single reason, that an award may be good in one part and bad in another; therefore you assign the breach to shew the Court that you insist upon a breach in a part of the award that is good.

NICHOLSON
against
SIMPSON.

POWYS, EYRE, and FORTESCUE, *Justices*, were of the same opinion.

THE COURT accordingly gave judgment for the plaintiff.

E A S T E R T E R M,

The Seventh of George the First,

I. N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Sir Robert Raymond, Knt Attorney General.**Philip Yorke, Esq. Solicitor General.*Bayly *against* Burman, Elway, and Others.

Case 421.

FAZAKERLY moved to join four declarations into one, on Declaration in affidavit that the assault, if any, was committed at the same assault against time and place. four cannot be joined.

PER CURIAM. It would be inconvenient to the plaintiff; for the other defendants as severed may be used as witnesses, which cannot be if joined.

FZAKERLY then moved to plead, *not guilty and son assault demefne.* The Court will not allow *not guilty and son assault* to be joined.

PER CURIAM. Those pleas are inconsistent. We have allowed two pleas that are so in case of executors, because the matter of defence does not always lie within their knowledge, but the defendant knows his own defence.

THE COURT denied the motion.

Case 422.

Stephens *against* Careless.

Declaration on a promissory note.

ACTION ON A PROMISSORY NOTE.—Exception, That it is *quandam notam sine billam*, and therefore uncertain to which the defendant shall answer.

PRATT, *Chief Justice*. It is the usual form.

PER CURIAM. Judgment for the plaintiff.

Case 423.

The King *against* Gibson.

An indictment for a fraud cannot be quashed on motion.

INDICTMENT for selling by measures unsealed. Moved to quash it, for that it is uncertain; that he sold to several of the king's, &c. several merchandizes by several measures unlawful and unsealed. *Styles*, 186.

PRATT, *Chief Justice*. If it is ever so bad, as it is a matter in its own nature a fraud and a cheat, you may demur; we shall not quash it on motion, though it is not so much as said *illicite*, nor any fraud alledged.

Case 424.

Anonymous.

In what case *oyer* may be prayed.

IF *oyer* of letters of administration should be granted? or, If they must demand *oyer* before the rules for pleading are out, and not before the time for pleading is out?

PRATT, *Chief Justice*. Whatever one party is to bring into court, the adverse party may crave *oyer* of; but *oyer* must be prayed before the rules for pleading are out.

Case 425.

The King *against* Jenkins.

Order of bastardy.

FAZAKERLY moved to quash AN ORDER OF BASTARDY.

FIRST EXCEPTION. It does not appear in any part of the order that they are justices, or that one is of the *quorum*; it is only set forth in the title, which are not the words of the justices.

SECOND EXCEPTION. It does not appear that the child was born, or was in the county: it is in the title of the order that the parish-church is in the county.

THIRD EXCEPTION. They have ordered security.

PRATT, *Chief Justice*. The order must be confirmed, for the title are the words of the justices; but as to the security, it must be quashed.

Anonymous.

Anonymous.

Case 426.

PER CURIAM.—Though a person has made his escape from the marshal, yet if he return, he is again in the marshal's custody, and cannot be taken by an escape-warrant.

A prisoner who escapes and returns, is in lawful custody.

The defendant, in this case, had escaped, but returned, and was taken by an escape-warrant when out upon a day-rule.

THE COURT ordered the warrant to be superseded, and the defendant to be delivered to the custody of the marshal.

The King against The Parish of Islipp.

Case 427.

THE CASE, on a special sessions order, appeared thus: *Henry Wilson*, at the statute, was hired by *William Jones* for a year from *Michaelmas* then next; and during the year he was sick two days, and went for three days to see his mother who was sick; but upon his return his master received him again, deducting sixpence off his wages for the time he had been absent, which he agreed to. At the end of the year the servant went to a statute against his master's leave, the master saying he should go for good and all; he refused to go on those terms, but did go and returned no more. During the service the master often said, that the servant should not gain a settlement at *Islipp*.

In what case the absence of a servant during part of the year, will not prevent his gaining a settlement.

S. C. Stra. 423.
S. C. Fort. 305.

MR. HAWKINS. A discontinuance or *cesser* of a service in the middle of a term, prevents a settlement as well as at the end. If a servant lie out one night, the master is not bound to take him again or pay wages for the time past (a). The master and servant shall not by their agreement make the parish liable that was not so.

PRATT, *Chief Justice*. The master may give his consent to let him go. Then if he is absent for any time without leave, the master by taking him again gives his consent.

EYRE, *Justice*. The service for a year must be such as usually services are.

This Term PRATT, *Chief Justice*, delivered the resolution of THE COURT.—During his sickness he was in service (b). The master receiving his service again, when he went to his mother, continues his service within the intent of the act; for he has dispensed with his absence. As to the last fact, as this case is, it is well enough: for first, the servant in a dutiful manner desired his master's leave to go on an honest and just account, and the master ought not to have refused it; and the servant not agreeing to the dissolution of the service, but insisting upon the continuance of it, and the master having refused the liberty, although he did not return it is suf-

(a) See *Rex v. Marlborough*, 12. Mod. 402.

S. C. 494.

Rex v. Madlington, Burr.

S. C. 675.

Rex v. Sharrington, 2. Bott,

(b) See *Rex v. Christchurch*, Burr.

525.

ficient

THE KING
against
THE PARISH
OF ISLIPP.

sufficient to gain a settlement; the rather, for that it appears in the order that the master several times said, that his service should not gain a settlement.

Therefore he is settled at *Islipp*.

Cafe 428.

Cumber against Wade.

The error of making time and place parcel of the issue, is aided by the statutes of *Jesuites*.

ERROR from the common pleas in an action of *assumpsit*, and several promises for work, for fifteen pounds. The defendant pleaded, that it was agreed between the plaintiff and the defendant, that the defendant should give a note for five pounds, payable in fourteen days, which was paid and received in satisfaction. Replication, that he did not give the note; and put the time and place in issue. Demurrer after issue joined.

REEVES. The plaintiff, by reply, has made the day and place of giving the note part of the issue, and that is ill. 2. *Saunders*, 317.

WEARGE. By consent of the parties and leave of the Court they may waive the issue; besides, it is aided by the statute of Amendments, which aids an immaterial issue; then an immaterial part of one is aided, and the day and place is immaterial; therefore, upon application to the Court, the day may be struck out of the declaration.

REEVES. After issue joined the record is closed; had it been waived it should not have been entered on record, and that it is on record shews that it is not waived. 2. *Keb.* 277. This issue is the same nature as payment before the day to action on a bond.

To an *assumpsit* for fifteen pounds for work and labour, a plea that the defendant gave the plaintiff a note for five pounds in satisfaction, is bad.

S. C. Stra. 426.

WEARGE. The plea is ill. The promissory note cannot be a satisfaction to the *indebitatus assumpsit*, for it is the same security (a). One bond is not a satisfaction for another (b). The reason of those cases conclude a promissory note from being a satisfaction to a promise. This is five pounds for fifteen pounds, and at a future day; the note only gives a right of action fourteen days hence, the other is a present right of action. Actual payment of a less sum is not a satisfaction (c), unless paid before.

LEE. Where accord is pleaded, it must be a matter that the Court can adjudge a satisfaction (d). The reason why a bond does not satisfy a bond is, that it does not give a higher remedy. The note does not give an immediate remedy (e).

REEVES. As to the sum alledged in the declaration, there may not be ten pounds due, for the sum is open, and the jury may give damages; it is not then like the cases of bonds, which is a sum

(a) Hob. 68.

(b) 2. *Keb.* 804. 3. *Mod.* 225.

(c) 5. *Co.* 117. *Leqn.* 19. *Moor*, 677.

(d) *Cro. Jac.* 100. 1. *Roll. Abr.* 129.

Cro. Eliz. 728. *Yelv.* 124. 1. *Lut.* 57.

(e) *Dyer*, 356. *Lutw.* 1537.

certain,

CUMBER
against
WADZ.

certain. A promissory note differs from the former, for it reduces to a certainty what is due, though the same in nature.

WEARGE. Though fifteen pounds is on bond, yet ten pounds may be paid.

FAZAKERLY. The note reduces the debt to a certainty, makes it transferrable, and he may pay a debt with it, which the simple contract would not. The defendant was under no obligation to give the note. A bond is not a satisfaction for a bond; not because it is a *chose in action*, but because it is the same thing. *Choses in action* have been satisfaction for *choses in action*. 1. Mod. 256. 265. 2. Mod. 43. 1. Roll. Abr. 122. pl. 10. So is an account stated, Raym. 450. 1. Salk. 76. A sum of money awarded, is pleadable in bar before performance. This award is a *chose in action*, as well as the note; and all the difference is, in one the parties, in the other the arbitrators, settle what is due. Suppose the note had been endorsed over; the defendant, if this was not a satisfaction, would be liable to the simple contract too.

PRATT, Chief Justice. A lesser sum cannot be a satisfaction for a greater in money paid, then surely a note cannot. Stating accounts is an actual satisfaction of the debt.

EYRE, Justice. One may recover on an *indebitatus assumpsit* after a note given, therefore it does not destroy the debt; it is something better as negotiable, but being a *chose in action*, it cannot be a satisfaction, Roll. Abr. 470. 1. Brow. 71. 47. not even a recognizance or statute staple. Higgins' Case, 6. Rep. A *chose in action* cannot be a satisfaction, because it must be an immediate present one, without suit.

FORTESCUE, Justice. The act has made a promissory note in the nature of a bill of exchange. As to five pounds for fifteen pounds, the jury might not give two pounds damages; then reducing this to a certainty puts him into a better condition. A bond payable before the day of a former bond, is satisfaction. Why? Not because it extinguishes the debt, but because it puts the plaintiff into a better condition. I cannot see the difference between this and an account stated; for in the one case the parties agree the sum, and in the other the defendant gives his note for it.

EYRE, Justice. An award is not pleaded as accord and satisfaction, but as a determination of the matters between the parties, in the nature of a judgment, and is pleadable in bar to an action on a bond.

This Term PRATT, Chief Justice, delivered the resolution of THE COURT.—The plea is not a good plea in bar (a). If it had been a security of a superior nature, it would have been an extinguishment: accord and satisfaction would bar; but five pounds is not a

(a) But see Taylor v. Baker, 5. Mod. 136. Hardcastle v. Howard, Hilary Term, 26. Geo. 3. 2. Term Rep. 28. *notis.* Kearley v. Morgan, 5. Term Rep. 513.

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satisfaction for fifteen pounds. He had an action on simple contract, and it is but a simple contract still, and therefore cannot be a satisfaction.

Judgment for the plaintiff.

Case 429.

Sibbord against Quin.

In what case the court of king's bench retains its jurisdiction against an inferior court.

ACTION ON THE CASE. The first count was for money had and received; and the second, on an account stated. Plea to the jurisdiction of the Court, that the defendant was agent under the plaintiff, who was a colonel of a regiment; and that the money was due, as such, for matters concerning the army; that by the statute 3. Geo. 1. no process shall issue touching such accounts until commissioners have determined it. Demurrer and joinder.

There were several exceptions to the plea: That it being a plea to the jurisdiction, ought to be certain to every intent; and this only is concerning the army, but does not aver that it is such a debt as the commissioners have a power to state and determine. They do not shew any commissioners appointed.

And this Term PRATT, *Chief Justice*, gave the resolution of THE COURT.—That they were all of opinion, that the plea was not good, and they must answer over. If the plea was commenced when we had no jurisdiction, though the jurisdiction had again arisen by the expiration of the temporary authority of the commissioners, yet we should have no jurisdiction; for the first process failing, all that follows fails.

Case 430.

Cutler against Goodwin.

A release of part of the damages does not release any of the costs given by the jury.

BRANTHWAITE. This is a writ of error on a judgment in the common pleas; there are several counts in the declaration; one was bad, and a *remittitur* as to damages on that count, *Hob. 178.* and I pray that judgment may be affirmed.

RFEVES. There are several damages and entire costs; the damages are released to one count, and entire costs taken. The case of entire damages is not the same as this; for if any count is good, the plaintiff is entitled to the whole costs, which are the expenses he has been put to. Damages are for what arose before the writ brought, *Baker's Case, 5. Co. 104.* Costs must be entire, and cannot be separate for every count, as damages may. *10. Co. 117.*

PRATT, Chief Justice. The jury gives but the common costs, and the Master taxes the rest, and considers and increases them only in respect of such counts as are good; there are an infinite number of records that are so. Therefore,

PER TOTAM CURIAM, the judgment was affirmed.

Bodmin

Bodmin *against* Pyke.

Case 431.

A TRIAL AT BAR.—PRATT, *Chief Justice*. Where a deed is to be proved, the Court will oblige the parties to produce the living witness, before they will admit any circumstantial evidence; and although in this case the witness denied his being present at the execution, the circumstantial evidence given afterwards so prevailed, that the jury found for the deed.

Evidence.

The Parish of Graveny *against* The Parish of Feverham. Case 432.

SARAH MAKESTREET was hired to *George Jackson*, two-thirds of whose house was in *Graveny* and one-third in *Feverham*; she lodged in *Feverham*, and the master in *Graveny*. The special order of sessions adjudged her settled where the servant lay.

A servant is settled in the parish in which the service is performed.

EXCEPTION. Inhabitation is necessary for a servant as well as an apprentice. *Salk.* 533.

S. C. Fort. 227.
S. C. Bott. 455.

PRATT, *Chief Justice*. The service is what gains a settlement, and it does not appear where that was performed; and whether we can take that by intendment is doubtful; so that it may be necessary to state the fact, before we can judge of that part. If there was a shop in one parish and a house in another, and a shop-servant performed his service in the shop and lodged in the house, the settlement shall be where the shop was.

The rule was, to shew cause why it should not go to a Judge of assize to settle the fact.

Wright *against* Hammond.

Case 433.

SPECIAL CASE agreed at *nisi prius* in *Kent*. The title of the lessor of the plaintiff was as heir at law, and of the defendant under a devise in a will, which was as follows: The deviser, tenant for life, remainder to his wife for life, remainder to her right heirs, makes this devise: "My lands in *Woolwich* my wife is to have for her life; after her decease of right it goeth to my daughter *Elizabeth* for ever, if she have heirs; if my daughter die without heirs in the life of my wife, and my wife does not marry again and have children, I give, &c."

Construction of a devise.

S. C. Stra. 427.
Comy. 23.
2 Eq. Ab. 311.
8. Viner Abr. 104.

Last Term REEVES said, The question is, If the defendant could take, and how or when he should?

The first limitation is to his wife for life, then to his daughter in fee, then the devise in question, which must be void, for a fee cannot depend on a fee (a). If a devise is to an heir for ever, and for default of heirs, to one who would be heir of the first devisee, it was adjudged an

(a) See Year-Book 19. Hen. 8. fo. 8. 1. Cro. 75. and Lev. 70.

estate-

WRIGHT
against
HAMMOND.

estate-tail, but here the remainder was given to one who could not be heir to the daughter. But the first clause is not a limitation by will, but a declaration that the lands were so settled. 2. *Vent.* 56. 3. *Lev.* 259. Then it is the same, as to the construction of the will, as if those words were left out, *Hob.* 13. which makes the will thus: "If my daughter die before my wife, without heirs, and if my wife do not marry again and have children, I give, &c." This is a contingency to take after the death of a person, and is too remote to make an executory devise. *Vaugh.* 216.

SERJEANT CHESSHYRE *contra*. It is by construction of the intent, not by law, that a devise to one for ever makes a fee; but where there is a remainder over, although it is to one and his heirs, the intention shall be construed an estate-tail. A remainder over to a person that would be heir at law, converts it into an estate-tail. 2. *Cro.* 415. 449. 1. *Roll. Abr.* 836. As to the first clause it is thus, "If she has it, I confirm it to my wife; if not, I devise it; and that my daughter must have it as heir, if I do not otherwise dispose of it, I give it her for ever, provided she has heirs." This is not a contingent remainder, but an appointment, when it shall take effect upon what must happen, though when is uncertain. 2. *Cro.* 416. *Webb v. Herring*, 1. *Saund.* 144. 152. 3. *Cro.* 323.

This Term IT WAS RESOLVED by THE COURT—In the case of *Webb v. Herring* the law is settled, that a devise over to a stranger, shall be no alteration of a prior devise to the heirs of the devisor. We are of opinion, that the first clause is no devise, for the words are, "the wife is to have, &c." and the lands being found so settled, this is only a declaration of the testator how his estate was to descend; and this being so, *Elizabeth* takes these lands as heir at law (a); and then, if this takes place, it must be an executory devise on the contingencies mentioned in the will. *Floyd v. Cary*, in chancery, a devise if a man had no heirs male of his body, adjudged an executory devise. The words are, "if the daughter die in the life of the mother, or without heirs." This being a remote contingency of a person's dying without heirs, which may never happen (b), it can never take place as an executory devise; and as a contingent remainder it cannot, there being no particular estate: Therefore the heirs at law of the devisor have good title.

(a) See *Wright v. Wright*, 2. *Vent.* 57. *Bamfield v. Popham*, 1. *Peer. Wms.* 59.

(b) *Gore v. Gore*, 2. *Stra.* 938.

Case 434.

Crompton against Ward.

A deed must be pleaded according to its operation in law, but otherwise of matters of fact,

ACTION for an escape.—The case was thus: The plaintiff recovered against *Mrs. Ogletborp*, by judgment, one hundred and thirty-two pounds; a writ of error was brought, pending which the defendant surrendered herself to the *Fleet* in discharge of her bail; she brought a *habeas corpus* to remove herself; and as she was carrying by

by the bailiffs to the Lord Chief Justice, the plea says, she was rescued out of the custody of the bailiffs by four persons unknown.

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against
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YORKE. They ought not to plead that she was rescued from the custody of the bailiffs, as the fact was, but of the sheriff, as the operation of the law is. 1. *Sid.* 96. 3. *Lev.* 290.

BOOTLE. It may be pleaded either way. *Palm.* 532. The cases cited are instances of joint-tenants, which is from the necessity.

PER TOTAM CURIAM. That objection has no weight.

EYRE, *Justice*. The rule is, that you must plead a deed according to the operation in law; but there is no rule that matter of fact shall be so pleaded. Fact should be laid before the Court, and they judge of the law.

YORKE. This is not a sufficient excuse for the sheriff. Returns of *rescous* have never been favoured, for they are liable to great frauds. *Statute of Westminster*, 2. *Car.* 29. Rescue on *mesne process*, before the party has been carried to gaol, has been held no excuse, *Cro. Jac.* 419.; but since it has been settled that it is, *Moore*, 852. *Cro. Eliz.* 868.; and the reason there given is, that the sheriff could not have the *posse*. But it was there held, if he had once had him in prison, a *rescous* would be no excuse. 1. *Roll. Abr.* 807. 4. *Co.* 84. 16. *Edw.* 4. fo. 3.

A rescue from the bailiff on a *mesne process*, while removing under a *habeas corpus*, will not excuse the sheriff.

WEARGE. There are three cases that relate to these actions: Persons arrested on *mesne process* and rescued before carried to gaol, now determined an excuse to the sheriff. 3. *Bulst.* 198. 1. *Roll.* 807. 1. *Lev.* 144. 3. *Leon.* 46. And that was not only on account of the *posse* (which the sheriff is not obliged to take at execution, if he can secure the prisoner without it), but in regard it was not certain what the plaintiff lost by the escape, or whether there was any debt until it was so determined by judgment; as also, from the impossibility of preventing a rescue on so many *mesne processes*, executed, perhaps, the same day and hour in distant places; and thirdly, That the plaintiff himself has the conduct of *mesne process*'s, names his bailiff, and so is probably guilty of *laches* or neglect. But not one of these will hold in the present case. The second resolution is, that a rescue from gaol is no excuse, in the same authorities; this is free from all neglect in the plaintiff, and impossible for him to prevent; which is wholly the same as our case. The third resolution is, rescue on a *ca. sa.* before brought to prison. Here is no such hardship to prevent rescue. Here is warning given to the sheriff of the danger, for the charge is fixed on the debtor by the writ. And all these circumstances are in the present case.

BOOTLE *contra*. She was never charged in execution; she must therefore be in custody by *mesne process*. Then what difference

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ference between a rescue before the defendant is in prison, and when out by *habeas corpus*? The sheriff is bound to obey the king's writ. In an escape on a *habeas corpus*, before execution, a recaption is a good bar. *Godb.* 177. One went away and came again to the gaoler before the return of the *habeas corpus*, and it was held no escape. *Moore*, 257. The plaintiff is not without remedy in this case; he may have an action, or attachment, or a writ of *rescous* against the rescuers; which he could not if on execution.

REEVES. The Court will be favourable in construction of the law in cases of sheriffs, because they are ministers of justice. 4. Co. 44. If the defendant escapes on *mesne process*, the party may retake him. 3. Keb. 340. 2. Lev. 109. 122. Hob. 22. 1. Roll. Abr. 207. Shor. 177. The reasons urged in the Books are supposed to be the grounds on which the resolutions were founded, especially when consonant to the resolutions in the old Books. The plaintiff is not without remedy, for he may have an action on the case, attachment, or writ of *rescous* against the rescuers; which he could not have had if in execution.

YORKE *in reply*. It is not insisted that she is in custody in execution. But it is very different from *mesne process*, and cannot come under the maxim of *de minimis non curat lex*, which is the reason of custody on *mesne process*.

WEARGE. As to the objection, that we may have a remedy against the rescuers; they may as well object, that we have a remedy against the sheriff. It has been much doubted if the party might sue the rescuers, *Lut.* 95. 1. Co. 109. 2. Cro. 419. but never has been doubted but that the sheriff might, even before action brought against him, 3. Cro. 53; but if two concur to do me wrong, I may have an action against either, 1. Roll. Abr. 90. pl. 3.

This Term IT WAS RESOLVED BY THE COURT—It is admitted on all sides, that before the party is in gaol on *mesne process*, a rescue is a good excuse for the sheriff, *Cro. Jac.* 419.; but where the party is in gaol, though on *mesne process*, no excuse; but in case of common enemies, not in case of rebels, 1. Roll. 187. The present differs from both these cases. When once the party is in the walls of the prison, the plaintiff has an interest in the prisoner, and a sort of property which cannot be divested; and although this is the king's writ, it is sued out by a subject, and one subject cannot divest another; nor the king, but in case of special prerogative, as making fortifications in war, &c. As to the objection of inconvenience to the sheriff: When he takes a man on *mesne process*, he is bound to take him if he meets accidentally, although he has not a sufficient guard, which is the reason of his being excused, for that it may be a surprize to him; and if this was a new case, perhaps it was as hard to distinguish from the case of the party taken in execution. But in the present, the party being
in

in actual custody, the sheriff has sufficient notice to prepare himself; and as he is charged, he is obliged to take care of him by the *posse comitatus*, or other sufficient guard; and therefore the action in this case lies against the sheriff, and the rescue is no excuse.

CROMPTON
against
WARD.

Tidd's Pract.
771.

Judgment for the plaintiff.

Woodford *against* Green.

Case 435.

WHITAKER, *Serjeant*, moved to set aside a writ of enquiry for too small damages.

Verdict set aside
for smallness of
damages.

It appeared that the action was for four hundred pounds deposited in the defendant's hands, and the jury entered into the merits of the cause, and gave a penny damages.

Strange, 425.

PER CURIAM. Where the damages are uncertain, as in an action of trespass, the jury are the judges of the measure of the injury complained of (*a*); but not where the demand is certain. If they will consent to let the enquiry and interlocutory judgment be set aside, and the defendant have leave to try it on general issue, be it so. But otherwise, let the proceedings on the writ of enquiry be set aside, and a new writ of enquiry be executed before the Lord Chief Justice (*b*).

(*a*) See Hayward *v.* Newton, 2. Stra.
940. Chambers *v.* Robinson, 2. Stra.
692.

(*b*) S. P. Markham *v.* Middleton,
2. Stra. 1259.

The defendant, who is a resident of the State of New York, is charged with the crime of larceny of a horse, to-wit: a horse of the value of \$100, which was taken from the plaintiff on the 1st day of January, 1884, at New York City.

Case 433 Woodbury v. Green

The defendant, who is a resident of the State of New York, is charged with the crime of larceny of a horse, to-wit: a horse of the value of \$100, which was taken from the plaintiff on the 1st day of January, 1884, at New York City.

The defendant, who is a resident of the State of New York, is charged with the crime of larceny of a horse, to-wit: a horse of the value of \$100, which was taken from the plaintiff on the 1st day of January, 1884, at New York City.

The defendant, who is a resident of the State of New York, is charged with the crime of larceny of a horse, to-wit: a horse of the value of \$100, which was taken from the plaintiff on the 1st day of January, 1884, at New York City.

TRINITY TERM,

The Seventh of George the First,

IN

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Jeffry against Wood.

Case 436.

FAZAKERLY. This is an action of covenant for transferring of *South-Sea* stock. The covenant set forth in the declaration is, that notice should be either given or left for the defendant; and in the declaration it is said, that it was left at his house, but does not say for him: he might leave it in such a manner at his house that the defendant might never know of it. The demand was on the twenty-fifth of *March* to be transferred the twenty-eighth: Whether by the agreement, which was to be in three days after the demand, the defendant has not any of the days? The plaintiff says in the declaration, that he attended the twenty-eighth. If the twenty-fifth is one of the days, the third from thence is the twenty-seventh, and then the plaintiff attended the day after it should have been transferred. Particular words shall restrain general in covenants. *3. Lev. 46.*

Construction of
a covenant for
transferring
South-Sea stock.

BRANTHWAITE *contra.* The note in writing left at his house, requiring him to transfer, must be intended to be left for him; especially when they plead a satisfaction and performance. If there was an election to transfer any of the three days, the notice will not take away the election; and he not having transferred the two first, has lost his election, and must do it on the last.

C c 2

PRATT,

JEFFERY
against
WOOD.

PRATT, *Chief Justice*. We must take the covenant for the time of transferring favourable for the defendant; he has any of the three days; but the demand is proper, and will not bind the defendant to the twenty-eighth. If the defendant had transferred any of the three days, you should have set it forth. The notice is well enough.

PER CURIAM. Judgment for the plaintiff.

Case 437.

Fitzacherly against Wiltshire.

Easter Term, 6. Geo. 1.

A custom of the city of London, that none but free-porters shall carry corn, is good.

S. C. 10. Mod. 338.
S. C. Stra. 462.

YORKE, *Solicitor General*. A custom to restrain a trade to a particular place or person, or for the benefit of a particular community, is good (a); for a bake-house (b), for grinding at his mill (c), *Gravesend* boat (d), and for folding of sheep (e). In *Hilary Term*, in the second year of *Queen Anne*, the judgment of the Court was in favour of this by-law (f). It was objected, that there is no consideration on the part of the City; but there is consideration (g). As to the number of porters, there is a power in the corporation to increase it; but that is a matter of fact which the Court cannot take notice of upon this return. This custom may have a reasonable commencement, though it does not appear; the long continuance of it without interruption, is a very good argument that it has a reasonable foundation. It was objected, that it extended to bind strangers; all customs that extend to sole trade bind strangers, and are only useful as such. It appears to be in the port of London, and is taken notice of as such in the Law-books. This is a by-law founded on a custom, and a custom may be to one who has no district in the place. It has likewise been said, that the subject-matter is not proper for the City to make a by-law upon; for it makes them judges in their own case; but there are several cases against that objection (h). The Court will take care that the penalties are reasonable (i). Any act of the common-council is the act of all the freemen; and it is no more than some of the members giving up their right to others. If it is void for extending beyond the limits, it is good for the rest, and void only *pro tanto*; which is agreeable to reason, as award, covenant, &c. A case of a by-law may be good as to members of the university, and void as to foreigners (k).

This Term, MR GAPPER *à contra* said, that returns to writs must be certain to all purposes (l). In *Cro. Eliz.* 512. it is not averred, that the weather was not foul nor the vessel leaky, in both which cases any person is allowed to work.

(a) *Cro. Eliz.* 203.

(b) 2. Bullf. 195.

(c) 1. Roll. Abr. 56. 2. Brownl. 177.

(d) 8. *Edw.* 3. pl. 37. S. Co. 125.

(e) 3. *Edw.* 3. fo. 3. 1. Roll. Abr. 557. pl. 2.

(f) See *Cudon v. Eastwick*, 1. Saik. 142. 6. Mod. 123.

(g) See *Sir G. Farmer's Case*, Co. Ent. 641.

(h) *Colchester v. Good, Carter*, 68. and the *Case of the City Beam*, 2. Ann.

(i) *Barnardiston's Case*, 1. Lev.

(l) 2. Vent. 33.

(l) 11. Co. 96.

PRATT,

PRATT, *Chief Justice*. This may be a proper objection to a declaration; but we are not to consider that upon a return. It was over-ruled in the case of *Fitzsaccharly v. Petre*, respecting the City Beam. FITZSACCHARLY
against
WILTSHIRE.

GAPPER. This by-law makes a corporation of the porters, and a corporation cannot make a corporation (a). It is nowhere alledged that the port is within the city; they cannot alledge a custom to extend out of the city (b). The by-law is void, for it restrains a matter of common right; they are only to restrain or regulate trade. But where there can be no fraud, there can be no restraint. It is unreasonable in part, so in the whole void. If one has a warehouse near the river, he cannot remove his own goods, for it is from the port and places adjoining.

WEARGE *in reply*. The cases cited of a by-law being void for restraint of a particular labour is, where there was no custom; such a custom may be good (c). The objection does not arise from the nature of the labour; it would be more unreasonable to restrain a trade of art and skill, to which a person has served seven years. This does not appear to be out of the liberties of the city: it appears by old records, that the river from *Staines-Bridge* even to the sea, was within the liberties (d). It appears upon the record, that the portage is only for goods going out of, and coming into, the port of *London*, and that is between *Staines-Bridge* and *Yendale in Kent* (e). A custom extended beyond the limits of a city may be good. An apprentice who served his time in *London*, may use his trade anywhere in *England* (f). A fraternity to have a succession, may be created by a corporation.

PRATT, *Chief Justice*. I think this a good by-law; and the custom that it is grounded upon, that there may be a restraint upon trade, is not now to be made a question: it may be more reasonable to restrain where no skill or art is required. If the City have time out of mind had this custom; they are obliged to find proper persons for the doing of it; the want of them would not only excuse the party from doing of it, but subject the City to an action, as in case of a ferry: the custom has a convenience in itself for the people, and therefore reasonable. As to its being within the liberties of the city: it has been rightly observed, that the port of *London* must be taken to be within the liberty of *London*. I do not know how to distinguish it from the *Case of Gravesend*. The case of meterage of goods is, I think, the same, and so of a town beam; and the cases cited by MR. WEARGE are direct in point. A by-law consisting of several particulars, is in nature of several by-laws, and it does not follow that because one is bad the whole is void.

(a) 1. Salk. 192. Andr. 210.

(b) 1. Luw. 564. 5. Co. 63.

(c) 8. Co. 121. b.

(d) 14. Edw. 2 Lib. Regum Antiquorum, cited in Stow's Survey, 266.

Charter of Hen. 3. Trinity Term, 3. Jac. 1. Roll. 89. Coke Ent. 335, 536.

(e) 1. Lev. 153.

(f) 1. Mod. 79.

FITZACHERLY
against
WILTSHIRE.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. The reasons that supported the customs of weighing of goods and measuring, are applicable to this; for the same reason may allow them the sole carriage, as the sole meterage. *Manly's Case* was in *Michaelmas Term*, in the eleventh year of *James the First*, and was on the meterage custom in the eighteenth year of *King James*; the by-law was made upon it. I think they are strong authorities to support this case. The *Case of Measurage* is laid in the same extent as this. A custom for the City to have eight-pence a ton for all cheese brought into the port of the city, laid as this. There can be no difference of restraint of skill or labour; if any more unreasonable, against skill is so.

FORTESCUE, *Justice*. The antiquity is ground enough to induce the Court to believe it reasonable. We may take notice of all the ports in *England*, because the statute 13. & 14. *Car. 2.* appoints the settlement of the ports. There is a custom of trying felonies committed in *Middlesex* at the *Old-Bailey*:

But, by EYRE, *Justice*, the *Old-Bailey Sessions-House* is half in *Middlesex* and half in *London*.

PER CURIAM. There must be a *procedendo*.

Case 438.

Anonymous.

A person who has mortgaged a copyhold estate, is not a competent witness in an ejectment concerning it.

AT THE SITTINGS in *Middlesex* (viz. at *Westminster*), in an ejectment, there wanted evidence to prove that J. S. was the son of J. S. to whom a copyhold estate was to come, and who had sold it to the lessor of the plaintiff; the said J. S. was called to prove it. But

DARNELL, *Serjeant*, objected that he could not be an evidence, he having sold the estate, which was two houses in *Whitechapel*, to the lessor of the plaintiff. But

PRATT, *Chief Justice*, said, that it being a copyhold, and there being no covenants against him (as usual in conveyances in fee-simple), nor any general warranty, he might be admitted to prove the estate was in, and is now gone out of him, if he has no interest in it.

He was accordingly examined upon the *voir dire* if he had any interest in it; and saying, that he only mortgaged it and did not sell it, he was set aside as an incompetent witness; for the equity of redemption still resided with him.

MICHAELMAS

MICHAELMAS TERM,

The Eighth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Sir Robert Raymond, Knt. Attorney General.**Sir Philip Yorke, Knt. Solicitor General.*

Stratford against Neale.

Case 439.

WRIT OF ERROR on a judgment on prohibition in the common pleas in *Ireland*, for tithes as rector of —. *Prohibition.*
S. C. 1. Stra. 482.
 The libel was for agistment of colts, cattle, &c. in the spiritual court of the *Bishop of Fern.* The declaration is, that no tithes were payable for agistment of young cattle brought up to the plough; and that the plea was refused below *defendente pro consultatione habend.* as to two entire parts found for the defendant. And judgment and consultation awarded generally. *S. C. 8 Mod. 1. S. C. Fort. 350.*

In *Hilary Term*, in the seventh year of *George the First*, exceptions were taken:

That the traverse was to the merits of the fact in the suggestion, that the cattle were not barren, or barren fed with hay, &c. which had paid tithes, which is not proper; for the matter suggested is not want of jurisdiction, but misbehaviour of the Judge in refusing the plea. 2. *Cro. 45. Cro. Eliz. 511.*

Suppose the matter in the allegation is good, yet it is too narrow for a consultation. That he did not feed the cattle during the whole time; if found fed any part of the time, a prohibition ought to go *quoad* such time. *Town Judgments, 174. pl. 8. F. N. B. 54.*

C c 4

CHESSHYRE,

STRATFORD
against
NEALE.

CHESSHIRE, Serjeant. The suit must be intended to be right in the ecclesiastical court, if it is matter found proper for the court, and it must be remitted by consultation, which is all we need pray: we follow them in the words of the traverse; the refusal of the plea is only matter of form.

This Term it was argued by **SERJEANT PENGELLY** and **MR. REEVES**, which I heard but very imperfectly. **THE SERJEANT** cited these several cases where consultations did go: 1. *Saund.* 81. *Show.* 200, 201. *Plew.* 468. 471. 1. *Leon.* 240, 241. 1. *Saund.* 140. 143. *Co. Ent.* 467. a. *Gro. Eliz.* 512. *Lutw.* 1043. 1052.

PRATT, Chief Justice. Where several matters are put in issue that are material, the jury must be supposed to find all of them in a general verdict. The consultation gives no new matter, but directs the court below to proceed on the libel there. I think the judgment ought to be affirmed.

POWYS, Justice, was of the same opinion.

EYRE, Justice. The declaration in prohibition comes in the place of a *scire facias quare consultatio non*, and gives it this turn, that the plaintiff in prohibition must shew the court below has no jurisdiction; and in the *scire facias* they were to shew that court had. In order to bring the first matter into question it is necessary to suppose a contempt, but we know that to be fictitious. The matter to be considered is, whether upon the whole it is properly cognizable in the spiritual court. If there had been a contempt, they should have proceeded by attachment for costs.

FORTESCUE, Justice, was of the same opinion; for that the only question before the Court is, Whether they have a jurisdiction, or not? which in my opinion they have.

The judgment was affirmed.

Case 440. The King against The Parishes of Tutton and Crompton Martin, in Somersetshire.

Two persons cannot be removed by one order, although to the same parish, if their settlements are independent of each other.

ORDER OF TWO JUSTICES for removal of *Samuel Tanner* and *Penelope* his wife and seven children; and *Francis Tyler* and his wife and eight children, from *Tutton* to *Crompton*. On appeal, the sessions discharged the order for insufficiency; another sessions discharged the order at last sessions.

EYRE, Justice. There ought to be two orders. The parties removed may appeal as well as the parish; their rights are distinct, and they cannot be settled by one order. The appeal must be determined at the next quarter-sessions; and if the original order be discharged there, it cannot be set up at another sessions that is subsequent.

FORTESCUE, Justice, of the same opinion. A demurrer is allowed in chancery when two distinct rights are set up in one bill.

PER CURIAM. Order quashed *nisi*.

Vicars

Vicars *against* Worth.

Case 441.

PROHIBITION granted for calling a woman's husband a cuckold in *London*; it being tantamount to calling the woman a whore.

Gronehouse *against* Cleaver.

Case 442.

THE DEFENDANT was delivered into the custody of the marshal of the *Marshalsea*, on the second of *December* last, and so continued, without any declaration, two Terms; but in *Easter Term* a declaration was left in the office, but not entered into the marshal's book or delivered to the turnkey.

A declaration against a prisoner must be delivered *personally* or to the turnkey.

KETTLEBY moved for a *superfedeas* to discharge him.

S. C. Stra. 474.
See 1. Tidd's
Practice, 202.

REEVES. The arrest was by process returnable in *Hilary Term*; in *Easter Term* the declaration was left. A declaration to charge one in custody, must be delivered to him; but a declaration which is only to prevent the process being determined by *superfedeas*, need not.

PER CURIAM. It is not sufficient; it ought to have been delivered to him or to the turnkey. And a *superfedeas* was granted.

Peters *against* Gillam.

Case 443.

ON A MOTION to set aside proceedings on a bail-bond, **THE COURT** was of opinion, that it would not be sufficient to answer the condition to put in bail before a Judge, unless he also put in bail to the Filazer.

Bail.
Tidd's Pract.
58. 288.

Pitt *against* Coney.

Case 444.

DEBT ON BOND, and judgment for the plaintiff. Error allowed, and no bail put in. *Scire facias* against the bail. Motion to stay proceedings, because error allowed is a *superfedeas* to all process against the bail.

There must be bail on a writ of error in an action on a bottomree-bond.

REEVES. By the statute 3. Jac. 1. c. 8. error is no *superfedeas* until bail put in, which ought, by Rule of the Court, to be within four days after error allowed.

S. C. Stra. 476.
5. Com. Dig.
"Pleader" 709.
4. Bac. Abr.
673.

WEARGE. This is a bottomree-bond, and not within 3. Jac. 1. c. 8. which is for payment of money only.

PRATT, Chief Justice. This is in the words and within the intent of the act; it is for payment of money only, though it grows due on a contingency, for the contingency has happened.

PER CURIAM. Put in bail this afternoon (a).

(a) See Garret v. Dandy, 1. Show. Desbordes v. Horsey, 2. Stra. 959.
• Scott v. Brace, 6. Mod. 38. Thrale v. Vaughan, 2. Stra. 1190.

PER

Case 445.

Smith against Trigg.

If a copyholder
ex parte materna
devise to his heir,
the lands remain
descendible to
the heir ex parte
materna.

S. C. 1. Stra.

487.

S. C. 8. Mod.

23.

4. Co. 209.

3 Cro. 44.

1. Salk. 187.

Cro. Jac. 100.

Cro. Eliz. 707.

EJECTMENT for copyhold lands in *Edmington*. A case was agreed at the trial.—*Hugo Hunt*, seised of lands in fee, surrendered to the use of his will, and devised them to *Jane* his wife, widow of *John Trigg*; she was admitted and surrendered to her will, and devised them to *Jane* her daughter, who married *Day*; *Jane* never was admitted, but entered and devised them to *Thomas* the defendant. The lessor of the plaintiff claims as grandson and heir of the elder brother of *John Trigg*, the defendant, by the devise of *Jane*.

The question was, Whether the devise of *Jane*, she never having been admitted, is good?

It is the surrender of a copyhold which transfers it, and it cannot be transferred but by surrender; and if she had transferred it by deed, it would have been a forfeiture. An *elegit* does not lie of a copyhold, because it cannot be transferred but by surrender. One cannot devise a copyhold without surrender; which cases shew that the surrender is the essential part of the conveyance. They cannot claim as heir at law, because a surrender alters the descent. If a copyholder neglect to be admitted and die, the heir shall not be prejudiced.

DARNELL contra. Though a copyhold cannot be transferred, yet the heir may take without surrender. The devise of *Jane* to her daughter, who was her heir, is void, because of the more worthy title; therefore will not alter the estate, for it is the same as no devise, and the heir takes by descent.

THE COURT. We are all of opinion, that *Jane Day's* title is by descent. By surrender to the last will nothing passeth to the lord, he being only as an instrument, and the whole estate remains to the surrenderor; who, after such surrender, may surrender it to another person. If he dies without will, the heir at law would claim by descent, he being seised in fee. The devise makes no alteration, that was of a freehold estate. The surrender is objected to make an alteration; but that makes no difference; devise of a freehold or copyhold is all one, because a title by descent was the best title. If the heir at law could claim by purchase, he could not without admission; which is necessary in a copyhold to pass the estate, by reason of the fine to the lord. When the heir enters and claims the estate, and devises it away, it proclaims his election to take by descent. We think the lessor has no title, and therefore judgment for the defendant now in possession, though he has none either.

HILARY TERM,

The Eighth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Justice.*Sir Lyttleton Powys, *Knt.*Sir Robert Eyre, *Knt.*Sir John Fortescue Aland, *Knt.*} *Justices.*Sir Robert Raymond, *Knt. Attorney General.*Sir Philip Yorke, *Knt. Solicitor General.*

Bernard against Fitzhouse.

Case 446.

IN *assumpsit* for two thousand pounds, MR. REEVES moved, that the defendant might plead double, *non assumpsit* and an usurious contract.

Non assumpsit
and an usurious
contract can-
not be pleaded
jointly.

THE COURT. This is different from the case of a bond or other security, for there an usurious contract cannot be given in evidence on *non assumpsit*; but otherwise in the case of a promise. The law is the same on the gaming act. Where the contract is void, it may be given in evidence on *non assumpsit*, as coverture, infancy. Wherefore THE COURT being of opinion that the usurious contract might be given in evidence on *non assumpsit*, denied the motion.

S. C. Fort. 336.
Bull. N. P. 152.
Co. Lit. 303.
March, 106.
Barnes, 365.
Fort. 337.
5. Com. Dig.
8vo. 390.

Button against Heywood and his Wife.

Case 447.

CASE FOR WORDS: "George Button is the man that killed my husband, Charles Wife." Verdict for the plaintiff.

Slander.
S. C. 8. Mod.

GLYDE moved in *arrest of judgment*. The first count is those words; the second, "I know the man who killed my husband, it was George Button." They are not certain, no particular manner

24.
See Peake v.
Oldham, Cowp.
276.

BUTTON
against
HEYWOOD
AND HIS WIFE.

manner of killing; it may be justifiable as self-defence, *per infortunium*, &c. they only breed a doubt in the mind of the hearers. It cannot be assisted by any construction to be intended a felonious killing. Words are taken in *mitiori sensu*. *Moor*, 573. *Co. Inst.* 306.

HUSSY. They say the husband was *adunc defuncti*. *Adunc* may be at the time of the declaration, not of the words spoken. *Hob.* 6. 77. 177. *Cro. Jac.* 215. 315. 4. *Co. Bonham's Case*. 1. *Roll. Abr.* 77. *So modo defuncti*. *Cro. Jac.* 331. 425. 2. *Salk.* 696.

WYNDHAM. They import, by necessary inference, a killing. *Cro. Jac.* 166. *Salk.* 695. 697. 1. *Lev.* 277. 4. *Co.* 15. *Cro. Eliz.* 49. 2. *Lev.* 15. To say, "You killed such a person," is actionable, without averment that he is dead. *Cro. Eliz.* 823. *Cro. Car.* 489.

PRATT, *Chief Justice*. There is no question, but at this day these words are actionable. Formerly words were taken in *mitiori sensu* to avoid vexatious actions, but now *distinguenda sunt tempora*; and people are always scandalizing one another. The words are certain, that he is dead; if so, there is no necessity for an averment, when words are to be taken in the sense of the hearers. There are very odd cases in the Books.

POWYS, *Justice*, was of the same opinion.

EYRE, *Justice*. The words are to be taken in the worst sense, *felonice, malitiose, et voluntarie*, 2. *Lev. Tews and his Wife*. 12. *Jones*, 141. which is a point settled. The death is ascertained, and implied in the words. 1. *Sider*. 52.

FORTESCUE, *Justice*. The rule is different from what it was before, when taken in *mitiori sensu*; this mode of construction has been exploded for forty, fifty, or sixty years. If words are disreputable, they are actionable; which was *Chief Justice HOLT's* rule, as also *HALE's* and *T'WYSDEN's*. If to be intended any justifiable killing, why did not the defendant justify it? In *Baker v. Pearse*, a late case, it was held that words are to be taken in *malam partem*. There is no averment, 1. *Vent.* 117. The Court will intend the party dead, unless it appears on record that he is living.

THE COURT gave judgment for the plaintiff.

Case 448.

— against Robins.

The *venue* cannot be changed in an action on a specialty.

GLYDE moved, in debt on bond in *London*, to change the *venue* into *Devon*, where the cause of action must arise, it being a sheriff's bond; and when breach is assigned, must be in *Devon*, and will be a great charge to the defendant to prove performance in *London*.

PRATT,

PRATT, *Chief Justice*. Shew cause; the plaintiff may consent; for if he shews no inconvenience to try it in *London*, there is a manifest prejudice to the defendant, so it may be reason to change it.

against
ROBINS.

EYRE and FORTESCUE, *Justices*. The *venue* is never changed in any action on specialty, which is a rule always to be observed; if such a rule is made, it is only to bring the parties to consent, not to shake the old rule.

See Tidd's
Pract. 358.

Gardiner *against* Joseph Walters and Jane his Wife. Case 449.

In Chancery.

WILLIAM GARDINER had a son (now complainant) and six daughters, and by his will gave fifteen hundred pounds to each daughter; and after, not having time to alter his will, gave five hundred pounds more to each daughter, and died. Jane, one of the daughters, married *Joseph Walters*, for which legacy he sued, in the spiritual court, the complainant, being executor with two others who renounced. The complainant, being defendant below, exhibited a bill to have the five hundred pounds note taken as parcel of the fifteen hundred pounds; and to have the direction of the Court in payment of the fifteen hundred pounds, in order to have an adequate settlement made by the defendant on the plaintiff's sister. It was insisted and admitted at the bar, that the five hundred pounds note was intended as an additional fortune, being so sworn by the testator's attorney, *Mr. Kinch*, who advised the note for value received. But

In what case the court of chancery will order a legacy left to a wife to be put out at interest for her use.

Eq. Caf. Abr. 64.
See Prec. in Chan. 548.
Tothil, 114.
Bunb. 86.
2. Atk. 420.

THE SOLICITOR GENERAL and SPENCER COWPER, for the defendants, insisted, that the other part of the bill was not proper, being brought by the executors to stop proceedings in the spiritual court; and that the rule of chancery, in making settlements, is only where the husband and wife are plaintiffs and bring their bill in equity to obtain their money, having no remedy in any other court; for then the Court will not extend equity unless the plaintiff does equity, by making an adequate settlement.

PARKER, *Lord Chancellor*. The equity is the same in both cases; a legacy is a trust, and an executor is a trustee. The consequence of this distinction is, only to compel all persons to sue for legacies in the ecclesiastical court, and avoid settling the same. This court has an equitable jurisdiction of legacies. This is a proper bill to know how the complainant may execute his trust. If a term of years is raised to make a daughter's portion, and they marry and sue at common law, on which the trustees exhibit a bill here to know how to execute the trust, this Court orders a settlement. Let the bill, as to the note, be dismissed with costs; and the defendant in his answer insisting on a settlement made, let it be referred to the Master to see if adequate; if so, the defendant may have his wife's fortune.

Spiller

Cafe 450. Spiller and his Wife, Widow of Solomon Andrews,
against Anne and Mary Andrews, Infants.

In dower against
an infant, an ad-
mission to pro-
secute by his
next friend, is
good.

Palm. 295.

1. Roll. Rep.

257.

Cro. Jac. 640.

Cro. Car. 86.

3. Bac. Abr. 149.

ERROR ON A WRIT OF DOWER in the common pleas. The plaintiffs demand dower. The defendants appear on the first day of summons and plead *touts temps prist*, and confess judgment to recover. The demandants suggest dying seised of her husband. A writ of seisin was awarded, and a writ of enquiry and judgment final.

MR. FLOYER. The guardian of the infants is admitted to prosecute instead of to defend. A guardian admitted to prosecute will not be liable to an action, if he allow dower where none was allowable (a). In the award of writ of enquiry and judgment to recover damages and mesne profits, from the return of the original and costs, which is not legal, because dower was rendered the first day of the summons, and *tout temps prist* pleaded. No damages in dower, only where the husband died seised, and the widow kept from the dower (b): she is not obliged to demand it *in pais*, but may by writ (c). In 14. Hen. 8. the writ of enquiry is said to be well awarded, because not pleaded *tout temps prist*. The damages are from the return of the original. If damages are recoverable, they must be pending the writ; but not pending the writ only, unless also before action brought (d). As to costs, none were recoverable at common law until the statute of Gloucester; and this case being out of the statute of Merton, is out of the statute of Gloucester (e). The quantum of the mesne value is beyond the first to the final judgment, which is contrary to the statute of Merton; for then an *habere facias seisinam* must have been sued out.

MR. SHEPPARD contra. *Ad prosequend. vel ad defend.* is all one. If *ad prosequend.* had been omitted, it would have been good (f). The heir ought immediately *super impetration. brevis* to assign the dower; and plea of *semp. parat.* is not sufficient, because the defendant must still have further proceedings, and then he is liable to render the profits, and also damages *pro detentione dotis*; for the statute is made to prevent all delays. *Damnum* is mentioned in all precedents. Judgment, or *morte viri*, must have been ill because of the *parat.* Costs of suit follow the damages. The statute says, that damages be recovered *quousque* the widow *habeat seisinam*.

FAZAKERLY in reply. The words of Merton are, *usque ad judicium* to have power, which is the first judgment, and not the final judgment and writ of enquiry.

(a) 9. Edw. 4. 43. Cro. Jac. 640.
2. Saund. 229. 295.

(b) 20. Hen. 3. c. 1.

(c) 14. Hen. 8. 25. Co. Lit. 326.
Rast. 235.

(d) Pitford's Case, Co. 17. a.

(e) Salk. 208.

(f) 1. Sid. 446. 1. Vent. 73.

Lut. 719.

PRATT, *Chief Justice*. The "*ad prosequendum*" is not proper, but well enough, for the guardian is to prosecute for the infants defence. "Always and still ready" is the default of the plaintiff in not demanding dower, but it is no excuse after a demand by original, though before it might. You was not ready when it was demanded in the king's courts. There must be a judgment to recover the damages, which cannot be ascertained until writ of enquiry.

SPILLER
AND HIS WIFE
WIDOW OF
SOLOMON
ANDREWS,
against
ANN AND
MARY
ANDREWS,

POWYS, *Justice*, of the same opinion.

EYRE, *Justice*. If the first is repugnant, it ought to be rejected; but it is sufficiently answered by the cases. Damages must be recovered, if not *à morte viri*. If recoverable *à morte viri*, their not recovering is not assignable for error, because it is for the defendants advantage. The case of *The Queen v. Ellis*, exactly the same. In *Rast. Ent.* 239, 240. the damages are remitted. Damages are recoverable from the time of the demand, which is the return; but if she would recover damages *à morte viri*, she must suggest a demand. He ought at the return of the writ to have delivered dower, and not only have been ready to do it. In plea of *parat.* which confesses dower, there are two judgments; the first to recover seisin, which is the only judgment for the seisin, and on that a writ awarded to deliver seisin and to enquire of the damages; and the second judgment is not a judgment of seisin. But why should not both these judgments be considered as one, since no error was ever brought on the first judgment until the damages were assessed? I am doubtful in this point, but very clear to the rest.

FORTESCUE, *Justice*. "*Ad prosequend.*" is to follow, which is as well applicable to the plea as for the plaintiff: "prosecutor" is the same as "procurator." The case in *Cro. Jac.* went on the point of *prochein ami*. Damages are very proper. The widow cannot enter, because it is of a third part entire and undivided; if she demand *en pais*, damages are recoverable *à morte viri*; if by writ only, from the return, *et semper paratus* is not material without assignment. Here are double damages, which is by the statute of Merton "*valorum*," which is the mesne profits and the interest; which seems the reason of the thing, and all the precedents are so, 1. *Roll.* 117. The first judgment is nothing to her; she cannot enter until an enquiry returns, which sets out a third part. The judgment must be intended a perfect, complete, and effectual judgment for her to enter.

EYRE, *Justice*. She has the same effect on the first as on the second judgment, and may enter before the enquiry returned.

PRATT, *Chief Justice*. Why should there not be damages *ultra* the award of the writ of enquiry, until final judgment?

EYRE, *Justice*. It is reasonable, but very particular.

PER CURIAM. The judgment was affirmed.

Cooper

Case 451.

Cooper against Darby.

In a justification under a precept from a borough court, it must be stated by what authority this court was held.

TRESPASS justified under a precept of the borough court. Demurrer generally.

FIRST EXCEPTION. There is no court set forth by prescription or otherwise (a).

SECONDLY, It does not shew the return of the precept, for the arrest was six months after the award of it (b).

ATCHERLY for the defendant. What would be error between the parties would yet be a justification to the officers. *Lut.* 1560. The arrest is *virtute præcepti*, which is traversable. To the first, this is not a court of record. *Cro. Eliz.* 303. *Lutw.* 925. 930. The return of the process not shewn in *Lutw.* 1560. 1. *Saund.* 23.

RICHARDSON for the plaintiff. Process pleaded the sixth of November to have the money at *prox. cur.* and arrest laid in June, without shewing it to be *prox. cur.*; so that no process is shewn to continue.

EYRE, Justice. If two processes are shewn, and justified by them, then a traverse *virtute* of one process is good; but if only one process is shewn, then *virtute præcepti* is not traversable, because the process must justify the officer.

FORTESCUE, Justice. The case in *Lutwych* was of a court held from three weeks to three weeks, and so it appeared that a court was held before the return. If a *capias* miss any Term in the return it is void, because the party must be detained all the while, 2. *Salkeld.* The case of execution is different.

EYRE, Justice. *Cro. Eliz.* 303. is *habere ad prox. cur.* such a day. The first objection is well.

PER CURIAM. Judgment for the plaintiff.

(a) See *Lutw.* 918. 1457. 1464. (b) 2. *Roll. Abr.* 563. 1. *Salk.* 409, 3. *Lev.* 141. 5. *Com. Dig.* 8vo. 793. 5. *Com. Dig.* 8vo. 799. 1. *Salk.* 200.

Case 452.

Brecon against Newton.

If an inferior court refuse a foreign plea, it is a contempt of the superior courts.

ON A MOTION FOR AN ATTACHMENT, it was declared by THE COURT, that if a Judge of an inferior court refuse any foreign plea, without any other ingredient, it is a contempt to every superior court; the plea being to oust them of jurisdiction, and to give it to the superior court.

Moor. 677.

Yelv. 32.

1. *Mod.* 44.

10. *Mod.* 349.

3. *Hawk. P. C.* ch. 22. s. 28.

And in this case the party having been detained in prison illegally, but discharged by the bailiffs, it was referred to the matter to make some satisfaction in ordering costs.

Sheers against Lammas.

Case 453.

IN REPLEVIN, avowry for rent, it was declared by THE COURT, that if *A.* being seised in fee, devise to *B.* in fee, and afterwards make a lease for years, it is an alteration of the devise *pro tanto* during the term, but not of the inheritance. And accordingly, without argument on demurrer, gave judgment for the plaintiff (*a*). A lease made subsequent to a devise of the land in fee, is an alteration *pro tanto*.

(*a*) See *Coke v. Bullock*, Cro. Jac. 691. Cro. Car. 23, 24. *Erudnell v. Hodgkinson v. Wood*, Cro. Jac. Boughton, 2. Atk. 268.

Heaven against Davenport.

Case 454.

ERROR on a judgment in *Southwark* court, in *indebitatus assumpsit* on a promise, for money laid out for the defendant's wife *dum sola*. In *assumpsit* in an inferior court for money laid out, both the promise and the expenditure must be alleged within the jurisdiction.

BAINES. The promise is alledged to be in the jurisdiction of the court, but not that the money was laid out in the jurisdiction, for that is the cause of action. 1. *Lev.* 137. 1. *Sid.* 97.

THE COURT. It is certainly error; for the money laid out is the cause of action, which must be laid in the jurisdiction of the court.

2. *Ld Ray.* 1310.
2. *Stra.* 827.
7. *Vin. Abr.* 19.

Judgment reversed (*a*).

(*a*) See *Stannion v. Davis*, 6. Mod. 2. *Wils.* 16. *Trevor v. Wall*, 1. Term 223. *Salk.* 404. *Peacock v. Bell*, Rep. 151. *Rowland v. Veale*, Cowp. 1. *Saund.* 73. *Waldock v. Cooper*, 20.

The Parish of Anmy Crufis against Barnsly.

Case 455.

JOHN JONES, during apprenticeship, hired himself for a year; the master burnt a paper and told the apprentice it was his indenture, but it does not appear that it was the indenture; but the apprentice went away and never returned. An apprentice cannot hire himself as a servant, unless his indentures are legally cancelled; stating the declaration of the master, that they were burned, is not sufficient; but the justices, from this evidence, may find the fact.

PRATT, Chief Justice. This is not a settlement, for there is no lawful hiring, because if the indenture of apprenticeship was continuing it is not lawful, and it does not appear to be burnt; there is only the declaration of the master, which might be evidence against him. The master never pretended to claim the servant, who went away and hired himself.

MR. WILLS said it was a good settlement, because the master could not reclaim his servant, or sue him or the second master. Burning the indenture is conclusive evidence against the master, if not against all the world. The servant cannot say he is discharged, because he has hired himself.

3. *Burr. S. C.* 320. 511.

FAZAKERLY contra. There is no evidence but what the master said, and no judgment by the justices that the evidence was true: it is not conclusive evidence. I have often heard say, that confession is the worst evidence.

THE PARISH
OF ANNY
CRUIS
against
BARNBY.

PRATT, *Chief Justice*. Justices are judges of the fact: this may be evidence of consent of the master and apprentice, and had that appeared the apprentice might have gained a settlement; the justices should have determined that, but that not appearing the order is imperfect.

PER CURIAM. Quashed.

Case 456.

Wilkinson against Mathews.

In what case a
prisoner out on
a day-rule may
be taken on an
escape-warrant.

WHITAKER, *Serjeant*, moved to discharge the defendant out of Newgate, being taken on an escape-warrant the day he had a day-rule.

It was declared, by THE COURT, that if one is taken at four in the morning, and at twelve the same day has a day-rule, there being no fraction of a day he is screened; and so it was held in HOLT's and PARKER's time.

PRATT, *Chief Justice*. To me it seems very odd, though resolutions are not to be shaken.

Referred.— On report he never entered his name with the marshal over-night, until after he was taken (at five o'clock in the morning), and put in petition sitting the Court.

THE COURT refused to discharge him out of custody.

Case 457.

Makeplaine against Diston.

An attachment
lies against an
under-sheriff for
not returning a
writ.

Dyer, 218.
Stra. 567.
2. Burr 797.
Dougl. 446.

ASCIRE FACIAS to assign error was returnable on the octave of The Purification.

DARNELL, *Serjeant*, moved for an attachment against Greenway, under-sheriff, for not returning the writ after a request.

WHITAKER, *Serjeant*. It is not returnable until Monday quarto die post.

PER CURIAM. Not to make out a warrant, and return the writ when required, is a contempt.

But, on the sheriff's offering to return and pay costs immediately, the Court did not grant an attachment. The case of return of bills, which are *de die in diem* on a certain day, is different.

EASTER

E A S T E R T E R M,

The Eighth of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir Robert Eyre, Knt.**Sir John Fortescue Aland, Knt.*} *Justices.**Sir Robert Raymond, Knt. Attorney General.**Sir Philip Yorke, Knt. Solicitor General.*Beamond *against* Rowland.

Case 458.

THE PLAINTIFF lent money to the defendant, a married woman and an infant, who at that time gave the plaintiff a warrant of attorney to confess a judgment, which was entered up, and execution executed.

The Court will not set aside an execution on a warrant of attorney, on a suggestion of it being for money lent to a married woman and an infant.

MR. WEARGE moved to set aside the judgment and to have restitution, for that the defendant was an infant, and that the warrant of attorney to confess a judgment is part of the process, and not like a bond; therefore the Court may set this aside on motion.

PRATT, *Chief Justice.* If a writ of error was brought, and the fact true, the judgment would be set aside. We shall not on motion assist in this matter, which will defraud the plaintiff, especially since there is another remedy besides by motion.

THE COURT denied the motion.

Anonymous.

Case 459.

UPON report of THE MASTER, common bail should have been filed, but was not; the plaintiff had not declared within two Terms, and *non prof.* was entered.

D d 2

FAZAKERLY,

ANONYMOUS.

FAZAKERLY. The *non prof.* should have been set aside, for they shall not take advantage, they not being in court by bail. If special bail had been required, and declaration been delivered before bail filed, it would have destroyed the right to special bail; must then the plaintiff lose the advantage of special bail, or be liable to *non prof.* if by delay bail should not be filed?

WEARGE. If common bail is not filed until after the declaration, the Court will oblige the attorney to file bail. And if the plaintiff deliver a declaration, and for want of plea take judgment by default, the judgment shall not be set aside for want of bail, if the attorney for the defendant had undertook to file bail.

PER CURIAM. For these reasons the *non prof.* is regular.

Case 460.

Haine against Manning.

Assignment of bail-bond.

10. Mod. 288.
1. Stra. 60.
2. Stra. 727.
Tidd's Pract. 156.

PRATT, Chief Justice. A subsequent sheriff cannot assign the bail-bond. The same person must assign after he is out of office, for the bond is in the person of the sheriff. In this case the plaintiff had the bail-bond assigned to him from the person that had been sheriff, when out of the office, and another was in it.

THE COURT gave judgment for the plaintiff.

Case 461.

Anonymous.

In what case proceedings on bond shall not be stayed.

2. Salk 597.
6. Mod. 101.
1. Stra. 515.
1. Atk. 118.
Tidd's Pract. 890.

ACTION OF DEBT on bond for two hundred pounds, conditioned for the payment of one hundred pounds in manner following: fifty pounds down, and five pounds *per annum* for ten years; and if the defendant should fail payment for any of those sums, the remaining sum shall be paid.

WEARGE moved, that on bringing in five pounds interest and costs, proceedings might stay, the sum of fifty pounds being in nature of a penalty; and this Court has by the 4. & 5. Ann. c. 16. the same power over actions on bond as equity has, and this is what equity would do for us.

PER CURIAM, dissentiente FORTESCUE, Justice. It is the agreement that the remaining sum shall be paid on failure of every five pounds. We will not put the plaintiff to his action for every five pounds: the sums being so small, he had better release them. The whole fifty pounds is but the principal in this case (a).

(a) But see *Erldges v. Williamson*, *Eonafous v. Rybot*, 3. Burr. 1370. and 2. Stra. 813. *Darby v. Wilkins*, 2. Stra. *Marlon v. Touchet*, 2. Bl. Rep. 706. 957. *Mayne v. Somner*, 3. Burr. 1374.

Case 462.

Broomley against Frazier.

Action lies against the drawer of a bill of exchange, although no demand has been made against the drawer.—*Strange*, 441. *Salk*, 126.

W B. in New England, sends a bill of exchange to Frazier, drawn on R B. in London. Frazier directs the bill to be paid to the plaintiff, who brought an action against Frazier.

WHITAKER,

WHITAKER, Serjeant. In case of a bill of exchange, no action lies against the indorfor until a default in the drawer, which default ought to be set forth in the declaration.

BROOMLEY
against
FRAZIER.

WEARGE contra. It is said that he became liable by the custom, and they have demurred, which admits the custom. In a case in *Salkeld*, **HOLT, Chief Justice**, said, that it was not necessary to be set out in the declaration. *Salk. 126.*

PRATT, Chief Justice, doubted how the custom is in these cases, but it seems to be reasonable that they should have an immediate remedy against the indorfor.

EYRE, Justice, took the indorfor not to be liable but in default of the drawer, and that is the reason of a protest; but whether this must be averred in declaration or not, is in doubt.

FORTESCUE, Justice. The indorfor only warrants the person who is to pay the bill.

Adjournatur.

This Term, **REEVES** said, that the indorsement is only an appointment to whom the bill shall be paid, but it makes the payment of the bill only in defect of the drawer. The indorfor, though liable as drawer, yet only on default of the first drawer. *Salk. 132.*

WEARGE contra. By the defendant directing the bill to be paid to the plaintiff, he becomes drawer as well as drawee. The second indorsee is always liable without averring a defect in the former, for the indorsement is always taken on credit of the indorfor, the first drawer being seldom known to the indorsee. *3. Mod. 86. Lut. 878.* Case of promissory note indorsed differs, *Salk. 126.* for the indorsement warrants the payment by the drawer, *Salk. 132.*

PRATT, Chief Justice. It is well enough: the law of merchants designed to distinguish them from all other contracts, to advance and facilitate the trade; by this law they are indorsed contrary to other contracts. If the indorsee must go to the drawer before he sues the indorfor, it would prevent all these contracts; therefore the indorfor or drawer is to stand liable, at the election of the indorsee.

POWYS, Justice, of the same opinion.

EYRE, Justice. The objection arises from a mistake relating to promissory notes. The indorfor of a bill engages payment, and the indorsee to get the payment. The indorsee of a promissory note must demand payment of the drawer, and the indorsee of a bill on whom drawn: the cases are very different, and what is adjudged in *Salk. 138.* relates to a promissory note: the indorfor is in that respect as independent as the drawer; and *Lambert v. Pack*, in *Salk. 127.* says, that proof of the hand of the drawer, in an action against the indorfor, is not needful.

BROOMELEY
against
FRASIER.

FORTESCUE, Justice. Civil law makes a difference between a promissory note and a bill of exchange; note between two, bill between three. If it must be demanded of the drawer, it must be of every indorser, which may be all the world over. *Salk.* 133. is expressly determined on arrest of judgment.

THE COURT gave judgment for the plaintiff (a).

(a) See *Laurance v. Jacob*, 1. Stra. *Hamilton v. Mackrell*, B. R. H. 324.
315. *Collins v. Butler*, 2. Stra. 3087. *Heylin v. Adamson*, Burr. 669.

Case 463.

The King against Carter.

An indictment for a trespass, taken before justices of the peace, quashed, for want of the words *nec non ad diversas felonias transgressiones et alia malefacta in comitatu prædicto audiendum et terminandum assign.*
S. C. 1. Stra. 442.

INDICTMENT for a trespass. The caption omits the words "*nec non ad diversas felonias transgressiones et alia malefacta in comitatu prædicto perpetrata audiendum et terminandum assign.*"

PRATT, Chief Justice. It is not incident to their authority, and if there is no act to make it so it is bad; therefore adjourn for **MR. REEVES** to look into it.

REEVES. The indictment is good without shewing the authority of the justices; they have power as justices to hear and determine by 34. *Edw. 1.*

FAZAKERLY contra. 1. *Vent.* 33. *Cro. Jac.* 633. There are some justices who have no commission of *oyer and terminer*.

EYRE, Justice. 2. *Cro.* 32. 2. *Rich.* 3. c. 9. *Yelv.* 46.

FORTESCUE, Justice. 12. *Hen.* 7. 25. *Hale's Observations* on 34. *Edw.* 3. 165. Bro. "Indictment," 32. 50. *Remover del Plea*, 22. 18. *Edw.* 3. c. 2. may require them to have commissions, but 34. *Edw.* 3. seems to give them power without commission.

Adjournatur.

This Term, **REEVES** said, The question is, Whether justices of the peace, as such, can hear and determine trespasses? No express commission is set out. The 1. *Edw.* 3. gives no such authority; and the 18. *Edw.* 3. requires a commission of *oyer and terminer*; but 34. *Edw.* 3. gives power, without any commission, to hear and determine felonies and trespasses. The clause of *oyer and terminer* in 34. *Edw.* 3. c. 1. does not relate to justices of the peace, but a commission granted to other persons, *Yelv.* 46. 2. *Cro.* 32. but since there have been different opinions. 2. *Cro.* 633.

FAZAKERLY contra. The statute 18. *Edw.* 3. c. 2. is not altered by the 34. *Edw.* 3. c. 1. which only makes an addition to the number of justices, and to declare the power they had before. In the caption it ought to appear, that either they have a commission, or are such persons as are described in the 34. *Edw.* 3. which must be a lord, or three or four most substantial persons in the county. By the 43. *Edw.* 3. the commission was enlarged to give them the powers intended by 34. *Edw.* 3. *Cro. Jac.* 633. 1. *Vent.* 33. 2. *Keb.* 160.

PRATT,

See 3. Hawk.
P. C. ch. 8.

PRATT, *Chief Justice*. The construction of 34. *Edw. 3.* will be and ought to be the same as 18. *Edw. 3.* "Shall have," that is by commission: there was no intent to alter 18. *Edw. 3.* it is only to shew that the new persons shall have the same power. Immediately after 34. *Edw. 3.* the commission was altered, which would not have been had they had a commission without it. All the precedents are against this indictment.

POWYS, *Justice*, of the same opinion.

EYRE, *Justice*. At first justices had no judicial authority; the 18. *Edw. 3.* gives them a commission, and the 34. *Edw. 3.* says they shall have power, and their writs shall issue. The true construction of that act is, that they shall not do it *ex officio*, but by a commission, which was required by 13. *Edw. 3.*; which is plain to be the opinion of that time, by commission awarded 35. *Edw. 3.* Opinions of the old Books remain so. 2. *Rich. 3. c. 9.* Indictment for treason, 12. *Hen. 7. c. 25.* No cases are contrary but *Yelverton's*, and that is not law. If by an act the justices had power, they need not set out a commission. *Cro. Jac. 633. 1. Vent. 33.*

FORTESCUE, *Justice*. Justices have two powers; one by the common law, which is only as *conservatores pacis*; and by commission of *oyer*, without which they cannot take indictments. *Hale's* opinion seems to be, that a commission is necessary on 34. *Edw. 3.* for it has words of relation, "according to the laws and statutes of the realm." 12. *Hen. 7. c. 25.* is strong as 2. *Keb. 160.*

THE COURT quashed the indictment.

Cotes against Robinson.

Case 464.

SIR EDWARD NORTHEY opened this (in *Easter Term*, 6. *Geo. 1.*) to be a case in ejectment, agreed at *nisi prius* to be thus: Sir William Jolliff was confessee of a statute of all lands and extended lands in *Staffordshire*, and had a *liberate*, and was evicted by extent on a prior statute. Then, without suing a *scire facias*, he extends lands in *Nottinghamshire*, then in mortgage to the lessor of the plaintiff, and had a *liberate*; on which the lessor brought this action.

In what case a re-extent may be issued into a different county.
S. C. 1. Stra. 46a.
S. C. Fort. 375.
S. C. 2. Will. 91.

HANBURY, *Serjeant*, in opening said, there was no eviction, but Sir William found the lands first extended insufficient.

HANBURY, *Serjeant*. The common law gave execution only against goods, except for the king (a). The statute of *Westminster the Second*, c. 18. gave an *elegit*; then 13. *Edw. 1.* gives the statute of Merchants; and 27. *Edw. 3. c. 9.* and 23. *Hen. 8. c. 6.* the statute Staple. These statutes, therefore, being in alteration of the common law, ought to be taken strictly. There may be extents into all counties in *England*, but they must be all awarded and returned about the

(a) 2. Inst. 394.

COTES
against
ROBINSON.

same time, *Cro. Ent.* 296, 297. *Rast.* 598.; so that Sir William had an opportunity to extend, and then the account would be entire and not by fractions. Where there is a *liberate* of goods, they are taken for part of the debt, but the extent is to hold *quousque* he is satisfied. The conusee may be without remedy by his own default. *Cro. Tit. Stat. pl.* 35. 2. *Roll. Abr.* 477. *Plow. Com. Rofs's Case.* The land is not originally the debtor; for if a person release the land, he may afterwards charge the body; the lands are only chargeable as they belong to the body at the time of the statute. *Cro. Stat. pl.* 25. *Hob.* 47. *Shepperd*, 359. 2. *Roll. Abr.* 476. The conusee, by the first extent, has made his election to be satisfied out of those lands; then he has discharged the other in *Nottinghamshire*, and shall not have an extent to them. *Fitz. tit. Exec. pl.* 84. 15. *Hen.* 7. *fo.* 14. 3. *Rich.* 3. 7. *Hen.* 7. 5. Thus stood the cases before the statute of *Hen.* 8. which gives a *scire facias*, and is explained in 1. *Inst.* 289. 2. *Inst.* 60. 4. *Rep. Fulwood's Case.* 5. *Rep. Bloomfield's Case.* 2. *Cro.* 330. 293. *Hob.* 2. *Sider.* 356.. 1 *Lev.* 269. The last comes to this case, and is in *Lev.* 479. and those two are, that after an extent in land there can be no execution against goods, much less *à fortiori* can there be one against lands. In 2. *Leon.* 12. *pl.* 20. extent to *Southton*, the sheriff gave possession of half, and there was a *vicecomes non misit breve*; then they took out a new extent, and returned an extent not made: this is a re extent, for that implies only against the lands of the same person, and need not be the same lands. The *Case of Boucher* is only that they may have extents into all the counties in *England*, but that must be at one time. The precedents are both ways, but they are of no authority, for the officers of the petty bag are not so very curious.

PRATT, *Chief Justice.* The statute binds all his lands, if part are extended and the party accept it, and it is filed. Whether he has not excepted those lands to hold *quousque*? and if so, Whether not bound by his acceptance where lands are in several counties, as in one? As to the value of the lands, the party must come at the return of the writ and complain; but if he has accepted it, the party is without remedy. Extent to several counties returned at the same time, must be taken as one execution.

In *Hilary Term*, 7. *Geo.* 1. CHESSHYRE, *Serjeant*, said, The question is, Whether the second execution is unwarranted? I maintain it is good *toties quoties*, in as many counties as the party has lands. It arises on 32. *Hen.* 8. c. 5. But briefly to explain executions before that act, and what alterations by that act. By 23. *Hen.* 8. this has the force of a statute staple, which arises from 27. *Edw.* 3. c. 9. by which due execution on inquiry, was on statute merchant and staple. As all lands are subject, so execution must in some cases be against all, or it may be defeated by *audita querela*. So in a *scire facias* against *tertenants*, one pleads, others make default. 3. *Co.* 14. 3. *Inst.* 296. 2. *Cro.* 506. 1. *Cro.* 507. *Moor*, 524. Consequently there is some method to extend

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extend the lands though in different counties, though by several writs and *liberates*; and averment of land extended in one county, no conclusion but to part. Before 32. Hen. 8. execution went into all the counties, some for the whole, some for part of the debt, *Raft.* 596. as appears by precedents; not unlike *elegit* and *scire facias*, which went into all counties. *Dyer*, 162. *Mod.* 24. 2. *Cro.* 246. *Brownl.* 59. 1. *Sid.* 184. 2. *Roll.* 469. pl. 6. 482. *Fitz. Ex.* 40. *Cro. Eliz.* 296. b. 297. Some being for the whole debt, adjudged that execution ought to pursue the judgment, 4. *Co.* 67. Lands in several counties, cannot be extended but by several extents and *liberates*. This is not a re-extent, but the first and original extent, and not properly called an *alias*. If the plaintiff was barred by *liberate* in the first county, he never could have another extent into another county, which is not reasonable. The statute 32. Hen. 8. has made an alteration, it is to favour creditors being remedial, to help creditors to their debts. The act gives relief after perfect execution, but was never intended to stop persons from going on to perfect execution. Besides, this is not a re-extent after award of execution on a *scire facias*, but a *testatum* of lands in another county. A re-extent on this statute can only be where the whole extent is recovered, evicted, or taken away. No words in this statute can restrain an extent in any other county. As to *elegit*, person is bound by acceptance of a moiety of the land, not of the writ, *Hob.* 58. If a void writ the party is not bound, *Pullen v. Pinbeck*; but *elegit* will go into any other county, and acceptance only binds in that county. *Westminster* 2. has given a moiety of all lands, as statute staple has all lands. As to the words in *F. N. B.* 131. c. . *The Lib. si acceptare voluerit*; they were inserted on account of *Aston Burnell*, which makes the acceptance on high appraisement before return; which means if he would take the goods at the price, and to refuse at the return lands extended too high, and pray a re-extent. So might the defendant, if appraised too low; so that there might be a re-extent even at common law. 22. *Aff.* pl. 44. 23. *Aff.* pl. 18. 2. *Roll. Abr.* 476. 2. *Hen.* 4. c. 17. 44. *Edw.* 3. c. 2. 2. *Cro.* 12, 13. If *liberate* be not returned it is a good execution, if the party has it to produce at a trial in ejectment. 5. *Co. Hofs's Case.* 4. *Co.* 67. Such writs need no return.

REEVES *contra*. The case will depend upon the law as it stood before 32. Hen. 8. and we pretend no aid from that statute to make it void, only to shew that if such re-extent was not void, there would have been no occasion to make that statute. The question is, If this is warranted by the statute *De Mercatoribus*? The statute says, all lands at the time of the recognizance taken, which by this case he had not; but I confess now the law is settled, and all lands at the time of the recognizance, statute staple or merchant, or after, are liable. I admit these lands are liable, but question if the conusee has not barred himself by the return and *liberate* of the lands in *Staffordshire*. The body of the debtor is original

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original debtor, *Plow. Com.* 72. and land becomes liable in respect of body; but the creditor may accept part of the land in satisfaction, and discharge the rest. At the return he may waive the acceptance, and pray a new extent into another county; or pray extenders to take the land, if too highly appraised; the return of the sheriff is not conclusive, but the acceptance of the party: if a man has an extent in one county and all land delivered to him, and the debtor purchase new land, yet that is a satisfaction, and the new purchased land will not be liable. The same law, if lands lie in different counties, for some reasons, will hold; and form of extent in several counties was by several writs taken out at the same time, for by writ in one county the sheriff cannot extend land in another; and such writ took notice of former writs in other counties, *Reg.* 1520. The precedents cited out of *Kastal* prove that the law then was, that one writ might be a bar to all other counties, *Old Ent.* 1186. because they apportioned part of the debt. *Dyer*, 162. Adjudged cases which respect *elegits* are to this point, and they are in the same reason of law. *Capias* to take the body, lay only on *non invent.* returned, 2. *Roll. Abr.* 476. and interest of conusee determined before satisfaction. 2. *Rich.* 3. 7. b. *Capias* lies only in the county where extent lay before. 15. *Hen.* 7. 14. b. No land liable on new extent. *Cases on Elegit*, 2. *Cro.* 338. 2. *Keble* 314. is in point. 1. *Lev.* 92. 3. *Lev.* 269. 1. *Lut.* 429. This is not within 32. *Hen.* 8. but shews what was before, 1. *Inst.* 270 a. It appears by the preamble no re-extent was to be had but after full extent. The words of *Hen.* 8. are general, and cannot be tied up to only a re-extent in the same county. *Mod.* 341. was objected, but oddly reported there. 3. *Cro.* 310. states the case truly, and there the suggestion was at the return, which waived the first writ. 1. *Roll. Abr.* 304. says, the second extent is only voidable by error; but the case is truly reported in 3. *Cro.* which contradicts *Mod.* and *Roll.* and the Court held it totally void.

This Term THE COURT delivered their opinion.—We are all of opinion, that the second extent is regular; a prayer being entered at the time of entering the first, which the court of chancery allowed.

NOTE, There was no judgment; it went off on proposal of going to a new trial.

Case 465.

Memorandum.

NEAR the end of this Term LORD CHIEF BARON BURY died, and BARON MONTAGUE was made CHIEF BARON.

The

The Case of Lambeth Parish.

Case 466.

REEVES moved to shew cause why an order for confirming a poor's rate should not be quashed. The rector granted a lease of the tithes to *J. S.* at a certain rent; *J. S.* for a certain consideration, covenanted with the occupiers of the lands in the parishes severally, that they should keep and retain the tithes to their own use. The question is, Who shall be rated for these tithes? They may lay a two-fold rate, according to the substance, or as occupiers of lands, tithes, &c.: the last must be upon the tenant, not the landlord; then the rate for these tithes must be paid by the persons receiving the profits of the tithes. All agree, that those who rent the nine parts must be rated for them; and why not those who rent the tenth part or tithe? The act appoints the rate to be made upon the occupiers of both. The thing in substance that should have been set out, the retainer takes; therefore he is occupier. The tithes remain not extinguished, notwithstanding unity of possession.

DARNELL contra. It returns to this question, Who is the occupier? The lessee is the person who takes the profits, and whoever takes the profits is the occupier. To say the retainer is the occupier, because he has the corn; they may as well say the baker and brewer are, for they have the corn.

REEVES in reply. The act puts lands and tithes upon one footing, and the latter is considered as one-tenth of the former: and he who receives the profits of the land is the occupier of the tithes; he who receives the tithes and puts them into his barns, is occupier, whether he has them by contract or otherwise.

PRATT, Chief Justice. No doubt but somebody must be rated in respect of the tithes. The only question is, Who is occupier? And I think the farmer of the rector is so, *prima facie*: but he has made a contract with the farmers of the land, for which he is to have (as we must intend) the value. They do not know what the retainer makes of it. Shall he be rated to the whole when he has paid the value for it? The farmer of the land pays, because he takes the lands subject to it: there is no harm done if farmer of tithes (who takes them subject to the rate as farmer of land) be rated for them: whether he sells them after they are set out, or before, is the same thing as to that; the profits and value are in him, and he receives them.

POWYS, Justice, of the same opinion.

EYRE, Justice. The question is, Who is occupier? I think the farmer still continues occupier: I should think otherwise if retainers were under-lessees; but the farmer of tithes sells them to the farmers of the land, and it is in nature of such to them.

2. Co. 137. He agrees, by parol, that for so much they shall retain

The parson must be assessed for the poor's-rate on his tithes, as the occupier thereof, altho' he has agreed with the tenant that he shall retain them.

S. C. 8. Mod. 61.

S. C. 1. Stra. 524.

2. Roll. Abr. 289.

2. Bulst. 354.

3. Keb. 255.

572.

16. Viner Abr.

427.

1. Stra. 77. 100.

THE CASE OF retain them; this does not put the lessee out of possession of the
 LAMBETH tithes; he is occupier still, and only sells them.
 PARISH.

FORTESCUE, *Justice*, of the same opinion.

THE COURT quashed the order of sessions (a).

(a) See *Rex v. Bartlet*, 16. Viner, 427. and 1. Conft's Bott, page 96.

Case 467.

Memorandum.

THIS Term MR. GILBERT, late Chief Baron of the Exchequer in *Ireland*, and MR. DENTON, were at a private call made Serjeants: and MR. GILBERT was made Baron of the Exchequer in the place of MONTAGUE.

TRINITY

TRINITY TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, Knt. Chief Justice,

Sir Lyttleton Powys, Knt.

Sir Robert Eyre, Knt.

Sir John Fortescue Aland, Knt.

} *Justices.*

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Badmerin against Pyke.

Case 468.

PENGELLY objected to a covenant to stand seised to the use of a stranger, in consideration of love and affection and for services done, for that no use can arise on such a deed, though it may on a lease for a year, where there may be a valuable consideration.

Covenant to stand seised to the use of a stranger, in consideration of love and affection, is a bargain and sale.

REEVES. It is of love and affection for services done, and in consideration of five shillings; and it is not necessary to prove the consideration, for that is in the person's own knowledge: services are sufficient to ground an *assumpsit*; and it will be the same in the case of a use; five shillings is certainly sufficient to raise a use.

1. Vent. 137. Saunders on Uses and Trusts, 556. 559.

PRATT, Chief Justice, and **EYRE, Justice.** If it pass in consideration of money, it must be a bargain and sale, and not being enrolled will not do in this case.

PENGELLY. It is love and affection for services done, which must be construed love and affection arising from services done.

EYRE, Justice. It is the same thing, for that makes the services a part of the consideration.

Byron

Case 469.

Byron *against* Phillips.

An officer cannot justify trespass under a *ca. sa.* on a judgment which was afterwards reversed.

S. C. Stra. 509.
5. Com. Dig.
Stra. 797, 798.

TRESPASS.—The defendants justify under a *capias ad satisfaciendum* on a judgment, which was afterwards set aside; one defendant being plaintiff in the action, the other the sheriff's officer. The plaintiff demurred.

WEARGE. On a judgment being reversed, all the proceedings remain of record; but if set aside for irregularity, it is a mere nullity: though the justification might have been good for the officer alone, it is ill for the plaintiff, and they ought to have severed. The case of *Turner v. Filgate* (a) is a case in point.

REEVES contra. The law has been taken otherwise. 2. Sid. 125. 1. Lev. 173.

PRATT, Chief Justice. The officer has involved himself with the plaintiff; we cannot distinguish them; and judgment must be against both (b).

EYRE, Justice. The justification is not good for the defendant, but the joining of the officer shall not prejudice him. As the declaration is of a trespass joint and several, the plea is to follow the nature of that, and may be taken jointly and severally, and the officer is not involved in the same case with the plaintiff; and his plea being allowed to be good, it should be severed.

FORTESCUE, Justice. The officer, by plea, deprived himself of the benefit he might have had.

(a) Ray. 73.

(b) Smith v. Bouchier, 2. Stra. 993.

Middleton v. Price, 2. Stra. 1184.

Parsons v. Lloyd, 2. Bl. Rep. 343.

Perkins v. Proctor, 3. Wils. 382.

Case 470. The King *against* The Mayor and Aldermen of Carlisle.

Q^z. Whether a corporation can remove a member for bribery, until he has been convicted of the offence at law.

S. C. 3 Mod.
19. 99.
S. C. Fort. 200.
S. C. 1. Stra. 385.
1. Burr. 339.
2. Burr. 723.
4. Burr. 1909.
Espinasse Dig.
677. 679.
3. Mod. 186.
12. Mod. 218.

MANDAMUS to restore one *Simpson* to the office of capital burgess of the city of *Carlisle*. The return was an amotion for bribery.

FAZAKERLY. The question is, Whether they can amove without conviction? A *mandamus* issued to restore a capital burgess of *Newcastle-upon-Tyne*, and it was returned, that he gave several sums for votes for a member; and held, though a sufficient cause, not good without conviction, because it is an offence at common law.

DENTON contra. In neither of the cases of *Rex v. Baggs* (a) or *Rex v. Mayor of Gloucester* (b) do I find judgment given: In that of *Gloucester* the question was, Whether resignation by parol was sufficient? for the capital burgess consented to his amotion. In *Baggs' Case* there was a power to amove given by charter. There may be a case where a person is removeable but not indictable, as *Serjeant Whitaker's Case*, for not attending at the sessions, which it was his duty to do. The *Case of Gloucester* was, Whether it was

(a) 11. Co. 99.

(b)

such

such a bribery for which he could be indicted? The offence in the present case is, that he offered sixty guineas to capital burghers to vote for *A.* at the next ensuing election for mayor, which is the business of a private election, only concerning the corporation; here appears a sufficient conviction. Whatever was the law before 9. Ann. it is altered, for thereby every material fact is traversable. *Styles*, 477.

THE KING
against
THE MAYOR
AND
ALDERMEN
OF CARLISLE

FAZAKERLY. It is a public offence, for a corporation is a public concern. Bribery has an odium in the law, and in case of a corporation imposes on the Crown by bringing wrong persons into office. Persons are not to be under the odium of common-law offences without a fair trial by the common law; here is no conviction at common law; the conviction by the corporation is what we complain of.

PRATT, Chief Justice. There are two questions, Whether the offence is indictable at common law? and if so, Whether the corporation can remove without a preceding conviction? It seems to me that this is an offence punishable at common law; and if so, Whether the king can empower any to proceed to conviction otherwise than by the rules of the common law? If he should grant such a commission, it would be against the rules of common law, and he surprized into it, for he cannot derogate from the common law. When the offence concerns only his duty as a freeman, if the corporation should not determine his power, no other jurisdiction could punish it.

POWYS, Justice, of the same opinion.

EYRE, Justice. Corruption in elections is a common-law offence, and is so declared to be by *Magna Charta*; but it does not follow that this member cannot be disfranchised before conviction. They have power to call him to an account for any offence against his duty; and there is no reason, that because he is not indicted for the offence at common law, they have no right to punish him for acting against his duty: like the ecclesiastical and temporal courts, they may both proceed in different respects. **LORD COKE** mentions several cases for which they may be removed; as erasing the charter, which is forgery; but if he forge a deed in which the corporation is not concerned, they cannot examine into it until convicted, and then they may disfranchise him as an infamous person. It was never determined by any resolution.

FORTESCUE, Justice. *Lane's Case* was on a judgment for a libel, which was not relative to his office, duty, or oath, and there a conviction was necessary: this may be a misdemeanor, for the common law has given this no particular name; for bribery is by **LORD COKE** defined, when an officer takes money. The king may empower a corporation to disfranchise a member, though not to punish a party but by the rules of common law (*a*).

(*a*) It is said, that the Court were afterwards unanimously of opinion that it was a good return: *S. C. Fort.* 200. And see *Rex v. Tiverton*, 8. Mod. 186. accord.

Case 471. The Parish of Great Amwell *against* St. John's, Hertfordshire.

Renting an entire tenement, though in different parishes, will gain a settlement.

S. C. Stra. 529.
S. C. Sett. & Rem. 106.
S. C. Foley, 329.

FAZAKERLY. An order of two justices, was confirmed by sessions, for settling a certificate person at *A.* who rented a farm of fourteen pounds *per annum* of one man. The house was in the parish, but the farm was part in the parish and part not. The words of the act for settlement of certificate persons is, "renting ten pounds *per annum*, or performing any office in such parish;" he must therefore rent the farm in the same parish.

PRATT, Chief Justice. The act says, "shall not gain, &c. unless they take a tenement of ten pounds *per annum*;" and the question is, Whether the words "such parish," which is different, shall refer to renting a tenement or performing an office only? It differs from 12. *Car.* 2. which is, "unless he comes to settle in;" this is, "take;" but whether it is to be understood so I doubt.

EYRE and FORTESCUE, Justices. The act intended, that a person of an ability to take ten pounds *per annum* was not to be removed. What shall gain a settlement for a stranger will gain one for a certificate person: the whole land belongs to the cottage, and it is not like the case of a house of one man and land of another.

Held a settlement, according to a note I have seen, *Trinity Term, 8. Geo. 1.*

Case 472.

The King *against* Lashmere.

The sessions cannot discharge a constable and appoint another, except on the neglect of the leet.

1. Roll. 585.
F. N. B. 168.
1. Mod. 13.
2. Jones, 212.
Stra. 798. 1050.
2. Hale, 88.
3. Hawk. P. C. ch. 10. § 49.

CHESSHIRE, Serjeant, moved to quash an order of sessions for *Suffex* for discharging *Pyke*, chosen constable of *Bramber*, and appointing the defendant. By the custom of *Bramber*, the old constable named one and the jury another, and the steward chose one of them, who so chose *Pyke*, and the sessions discharged him because not resident. The sessions has no jurisdiction, unless the leet neglects, or the constable denies. By 13. & 14. *Car.* 2. by the common law, the leet has jurisdiction: If he has reason to object, because not resident, it was proper at the leet. The sessions not having jurisdiction the order is void, be there never so good a reason.

EYRE, Justice. The sessions have no jurisdiction (*a*).

FORTESCUE, Justice. *Rex v. White(b)* is, that justices may turn out a constable, but not elect one; there may be a great inconvenience, since leets are held but twice a-year, if justices cannot remove them.

EYRE, Justice. The sessions have no jurisdiction by the act of parliament, except on default of the leet.

(*a*) See the Case of the Constables of Limington, 2. Stra. 798. *Rex v. Hodson*, 12. Mod. 180. *Rex v. Gouge*, 2. St. A. 1213.

(*b*) 1. Salk. 159,

PRATT, *Chief Justice*. If the appointment of one who is not resident is void, it is of course no appointment.

THE KING
against
LASHMEER.

EYRE, *Justice*. That is a question; for then the jurisdiction devolves to the sessions.

PRATT, *Chief Justice*. If the leet appoint a constable who lives a hundred miles off, and the sessions cannot appoint another, the town is without a constable, which is an inconvenience we will prevent if possible.

HILARY TERM,

The Tenth of George the First,

IN

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir John Fortescue Aland, Knt.**Sir Robert Raymond, Knt.*} *Justices.**Sir Philip Yorke, Knt. Attorney General.**Sir Clement Wearg, Knt. Solicitor General.*

Case 473. The King against The Mayor of Kingston-upon-Hull.

Two persons, claiming in different rights, cannot be joined in the same *mandamus*.

S. C. Stra. 573.

S. C. 8. Mod. 209.

Salk. 433.

5. Mod. 10, 11.

Comb. 307.

LAST TERM several *mandamus*'s were moved for to admit several persons, by name, to their freedom in the corporation of *Kingston-upon-Hull*, of which no use was made; but the last day of last Term a rule was moved for and obtained, that a *mandamus* should go to the mayor and aldermen, to call a HALL and do the business of the corporation; on this last rule they make out a *mandamus* to assemble the corporation, and admit the several persons who had right to their freedom, not naming them.

PENGELLY, *Serjeant*, moved to quash the *mandamus*, because there ought to be several *mandamus*'s for the several persons, and not for them all jointly, for their titles may be distinct and quite different.

PER CURIAM. We must supersede the *mandamus*, if not upon that account (a), yet because there is no warrant to ground them upon; the rule being given in general to do the business of the corporation, and the *mandamus* is to do a particular business (b).

And THE COURT would have given costs, but the Counsel for the corporation would not ask it.

(a) See *Rex v. Lord Montacute*, 1. Bl. Rep. 60.

(b) See S. C. 8. Mod. 209. and *Rex v. Widdman*, 2. Stra. 893.

Anonymous.

Case 474.

PER CURIAM. If a steward of a court do any act which he claims to do by prescription or otherwise, information in the nature of a *quo warranto* lies as well as for a misdemeanor. Not like the case of a justice acting beyond his power, for in that case this Court takes notice of their authority.

Information *quo warranto* lies against the steward of a court.

Co. Ent. 523.

541. Cro. Jac. 259. Yelv. 190. Stra. 621. 1213. Rex v. Meddlicot, 1. Bar. K. B. 221. Rex v. Bridge, 1. Black. 46. Rex v. Cann, 3. Burr. 1822. Rex v. Wallis, 5. Term Rep. 375.

Anonymous.

Case 475.

THE DEFENDANT was arrested on a bond, and, being in custody, sent for a person, who is a practicer but not a sworn attorney, and executed a warrant of attorney to confess judgment. On motion to enter up the judgment,

The attorney present when a warrant of attorney is executed, must be a sworn attorney.

PRATT, Chief Justice, said, he must be a sworn attorney.

And **THE COURT** refused to enter up the judgment.

FORTESCUE, Justice. The rule says "an attorney," but does not say "a sworn attorney," must be present.

PRATT, Chief Justice. An attorney is a sworn attorney.

TRINITY TERM,

The Tenth of George the First,

IN

The King's Bench.

Sir John Pratt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

Sir Robert Raymond, Knt.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Case 476.

Jenney against Herle.

A bill payable out of a particular fund, is not a bill of exchange.

S. C. Stra. 91.
S. C. S. Mod.

263.

S. C. Ld. Ray.

1361.

10. Mod. 294.

316.

3. Will. 207.

WRIT OF ERROR on a judgment for the plaintiff in the common pleas, in an action on a bill of exchange against the drawee. It was to pay such a sum to the plaintiff out of the monies which he had in his hands, that belonged to the proprietors of the *Devonshire* mines, for an estate they had purchased of him.

WEARG, Solicitor General. Every bill of exchange should be absolutely payable, not upon a contingency, otherwise it is not negotiable. If he had none of their money in his hands, this note is not payable; this was ruled in the case of *Joslin v. Laffer*, *Easter Term*, in the first year of *George the First*. Besides, they have not set out any valuable consideration as "for value received."

PRATT, Chief Justice. The reason that a man shall be bound without the solemnity of a deed, is the consideration, and that to be taken without proof is for the conveniency of trade. He appoints a person who was never debtor, and if he has money he may pay it, but if he has not, the drawer is not liable. It is the same case as *Laffer's*.

FORTESCUE, Justice. A bill of exchange cannot be made payable out of a particular fund, as was *Laffer's Case*. In all foreign

foreign bills of exchange it is expressed "for value received;" it has been held not necessary to be expressed, but it must be implied.

JENNEY
against
HERLI.

RAYMOND, *Justice*, of the same opinion.

POWYS, *Justice*, *absente*.

Judgment reversed (a).

(a) See *Dawker v. Deloraine*, 3. Will. Lynch, 2. Ld. Ray. 1563. Kyd on
207. 1. Black. Rep. 782. *Banbury v. Bills*,
Liffett, 2. Ld. Ray. 1211. *Haydock v.*

Anonymous.

Case 477.

FAZAKERLY. Action on a bond against one; *oyer* craved, A joint bond is and it appears to be a joint bond, and concludes "sealed with good against the
"the seal of us," therefore must be taken to be sealed by both. party who ex-
executes it.

PRATT, *Chief Justice*. Not without averment; and if but one sealed, it is good against him.

Judgment affirmed.

The King *against* Burroughs.

Case 478.

ON A MOTION to shew cause against an attachment, for chal- An attachment
lenging the array after he had entered into a rule, by consent, granted for chal-
that the jury should be struck by the Master, &c. for that there lenging the ar-
are several instances where, in the like rules, words have been ray, after con-
added, that neither party shall challenge the array for want of hun- sent that the
dredors. master should
strike the jury.

But *PER TOTAM CURIAM*, The rule is, that the sheriff shall bring his book to the master, that he shall appoint such a number, that the parties shall each of them strike out so many, and that the cause shall be tried *per residuum jurator*.; but this challenge says it shall not be tried by them. If this challenge was not contrary to the express words of the rule, it is contrary to the necessary implication of the rule, and that is the same. There must be an attachment.

Horn *against* Cooper.

Case 479.

INDEBITATUS ASSUMPSIT upon a bill of exchange. De- *Indebitatus as-*
murrer to the declaration. *sumpsit* on a bill
of exchange
against the
drawer.

Assumpsit lies not upon a bill of exchange for want of a con-
sideration. *Salk.* 125. 2. *Lutw.* 1504.

PRATT, *Chief Justice*. This sets forth, that the person on whom drawn would not accept, and on that the drawer became liable to pay it, according to the custom of merchants, and that is enough: it goes further, that thereupon he promised to pay; but that will not hurt, though not necessary.

Judgment for the plaintiff.

E e 3

MICHAELMAS

Hard. 485.
1. Mod. 285.
1. Vent. 152.
1. Freem. 74.
1. Lev. 208.
1. Salk. 125.
8. Mod. 373.
And see Kydd
on Bills of Ex-
change, 177.

MICHAELMAS TERM,

The Eleventh of George the First,

I N

The King's Bench.

*Sir John Pratt, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir John Fortescue Aland, Knt.* } *Justices.**Sir Robert Raymond, Knt.**Sir Philip Yorke, Knt. Attorney General.**Sir Clement Wearg, Knt. Solicitor General.*

Case 450.

The King against Edwards and Others.

An indictment
will not lie for
conspiring to
burthen a parish
with a pauper.

S. C. Stra. 707.

S. C. 8. Mod.

329.

S. C. And. 374.

INDICTMENT for a conspiracy to charge the parish of *Stoak* with the maintenance of a poor woman, and that for that purpose the defendants gave some money in marriage with her to a poor man of *Stoak*.

Motion to quash it; and it was insisted to support the indictment, that although the payment of money was lawful yet the indictment lay, for that the conspiring alone is indictable, without any act done in pursuance of such conspiring. 1. *Lev.* 62. 1. *Vent.* 304, 305. 1. *Salk.* 174.

BAINES, Serjeant, contra. In these cases the conspiracy was to do a wrong to another person; here is no wrong or injury to any other. They do not say the man is likely to become chargeable, so no wrong to the parish. This indictment is found at the quarter-sessions, and they have no jurisdiction in this case.

PRATT, Chief Justice: If the means used to bring the conspiracy about are unlawful or doubtful, this Court will not quash the indictment upon motion; but where the means are clearly lawful, the Court will. Whether the marriage of this old woman is lawful or not, is according to the circumstances, and uncertain; therefore they ought to demur.

FORTESCUE,

FORTESCUE, *Justice*. If the design of the conspiracy or end of an indictment is fraudulent, whatever are the means the Court ought not to quash it on motion. The Court, perhaps, might if the second exception had been clear.

THE KING
against
EDWARDS
AND OTHERS.

RAYMOND, *Justice*. Quashing an indictment on motion, is entirely in the discretion of the Court; and this ought not to find favour to be quashed on motion.

THE COURT, on demurrer, gave judgment for the defendant (a).

(a) But see *Rex v. Tarrant*, 4 Burr. *Rex v. Compton*, Cald. 246. *Rex v. 2106. Rex v. Sadler*, Sayer, 260. *Updale*, Cald. 247.

Anonymous.

Case 481.

A MOTION was made to set aside an execution erroneously issued out. On report of THE MASTER it appeared to be thus: The judgment, entered upon a warrant of attorney, was signed the fourteenth of February, two days after Hilary Term, in the ninth year of George the First. The *feri facias* bore *teste ult.* the last day of Hilary Term, in the tenth year of George the First. It was insisted, that the judgment, by fiction in law, was given the first day of Hilary Term, and then the execution is above a year and a day after.

Judgment entered 14 Feb. 9. Geo. 1. and the *feri facias* bore *teste ult.* Hill. 10. Geo. 1. *Quare*, Whether erroneous.

FAZAKERLY in answer said, that if any process appeared that Term, the judgment might be taken to be the last day, and desired leave to enter up continuances; but there being none,

THE COURT would not grant leave to enter up a falsity upon record.

Then he acquainted the Court, that the defendant was in THE FLEET, and if they lost this execution they lost their debt; and moved, that setting aside matters of irregularity was favour in the Court, which they might refuse, and the defendant might be put to his action.

To which opinion PRATT, *Chief Justice*, and POWYS, *Justice*, adhering; FORTESCUE and RAYMOND, *Justices*, dissenting, nothing could be done.

The King against Cripland.

Case 482.

INFORMATION for endeavouring to corrupt a person in the election of a mayor of Tiverton, in the room of one John Upton. It is laid, that in order to induce him to vote he promised him fifty pounds. It does not appear that he did actually give the said money, or that the person took any notice or regard of the said promise, or did anything in pursuance thereof; and then it

An information lies for promising an elector a sum of money to induce him to vote for a particular candidate for the office of

mayor, although no money is actually paid,

E c 4

might

THE KING
against
CRIPLAND.

might be a breach of good behaviour in the defendant, but could go no further. *Salk.* 380. *Poph.* 134, 135. One member of a corporation may solicit another to vote for his friends.

Afterwards, in this Term, THE COURT gave judgment for the King. It is an offence for which an information will lie, for one of a corporation to endeavour to corrupt another in an election of a member (a).

(a) See *Rex v. Plympton*, 3. Ld. Ray. 1377. *Rex v. Vaughan*, 4. Burr. 2494.

Case 483.

Skipwith against Green.

If a lease be made of meadow, pasture, and arable lands, in which two parcels are described as "Lane's Meadows," and an action be brought against the lessee for ploughing up "Lane's Meadows" contrary to covenant, the defendant may shew that the lands thus described were arable and not meadow lands, for the words in the lease are descriptive of the locality, and not of the quality of the lands.

S. C. 1. Stra.
610.
S. C. 3. Mod.
311.
S. C. 3. Danv.
272.

ACTION on a covenant in a lease for years, wherein are several parcels of land demised, and among others one parcel called *Lane's Meadows*, and one entire rent reserved, and over and above the rent reserved, five pounds an acre *per annum* for every acre of meadow or pasture that the said *Green* should plow up: and the defendant covenants to pay both the said rents as reserved. It is averred, that he plowed one hundred and twelve acres of meadow, called *Lane's Meadows*, for which so much rent was in arrear, and did not pay it. Plea as to thirty acres, parcel of the hundred and twelve, *non aravit*; as to eighty-two the residue, that at the time of the lease, and for sixty years before, they were and have been arable; *per quod* he plowed them as it was lawful; *absque hoc* that they were meadow. Demurrer and joinder.

REEVES. These lands are demised to the defendant as meadows, by the name of *Lane's Meadows*; he is therefore estopped to say they are not meadows; and this estoppel appearing on the record, we need not shew it by replication, but may demur. *Kemp v. Goodale*, *Easter Term*, 4. Ann.

HAWKINS, Serjeant, contra. The estoppel is the word of the lessor, and we accept the lands by the name he gives them; it is unlike where the covenant or estoppel comes from the party himself. This is not contradicting the deed, or destroying the effects of it; it is only saying, that the lands which came to us by the name of meadows in reality are not so. Estoppels are odious in the law, and therefore when we covenant not to plow any meadow or pasture, it must be taken to mean an actual meadow.

REEVES in reply. The indenture is all the words of both parties. On a deed poll, one may plead *nil habuit in tenementis*, it is the words of one only.

PRATT, Chief Justice. The rule in law, that a deed shall be construed according to the intent of the parties, is never to be broke through; which is not here that *Lane's Meadow* is meadow, but only that it is a description of lands which have been antiently known by that name, and have kept the same description, though they have been plowed for many years. They are not estopped to say anything which is not contrary to the intent of the parties. If it was an estoppel it is the same, whose words soever they are, for they are all the words of each party.

POWYS,

POWYS, *Justice*, of the same opinion.

FORTESCUE, *Justice*. By accepting the lease and executing the counterpart, the lessee assents to every material part. The instance of *nil habuit in tenementis* is denying the lease, and stronger than this, which is only denying that which is in the lease called meadow to be so, which may well be tried.

SKIPWICK
against
GREEN.

RAYMOND, *Justice*. An estoppel is what the Court should never come into but of necessity. There has been no case to shew that the party could not have had that parcel of ground if it had not been meadow. Suppose it had been *Lane's Meadow* containing one hundred acres, would he have been estopped to say they were but fifty?

FAZAKERLY acquainted the Court that he was retained to speak to it.

But THE COURT gave judgment for the defendant, unless cause this Term, being very clear.

L'Neve against Skill.

Case 484.

In Chancery.

FRANCIS L'NEVE seised in fee of a copyhold, upon marriage of *Oliver L'Neve*, a distant relation, covenanted to surrender to the use of himself for life, remainder to the said *Oliver* for life, remainder to the issue of the marriage, remainder to *Oliver* in fee. *Oliver* settled great part of his own estate on the said marriage, with provision for younger children's portions. No surrender was made according to the covenants; *Francis* died; the wife of *Oliver* died without issue; he took a second wife, and had issue; *Oliver* died; his issue by the second venter, the heir of *Oliver*, prefer a bill against the defendant, the heir at law of *Francis*, for performance of the covenant.

Covenant with-
out considera-
tion.

1. Vezey, 64.
3. Atk. 646.

It was objected, that as to the heir of *Oliver* the covenant was without consideration.

But PARKER, *Lord Chancellor*, was of opinion, that his settling his own estate upon the same marriage, which might be an injury to his heir, was a consideration to raise a use to the heir; and decreed a performance of the covenants.

EASTER

E A S T E R T E R M,

The Eleventh of George the First,

I N

The King's Bench.

*Sir Robert Raymond, Knt. Chief Justice.**Sir Lyttleton Powys, Knt.**Sir John Fortescue Aland, Knt. } Justices.**James Reynolds, Esq.**Sir Philip Yorke, Knt. Attorney General.**Sir Clement Wearg, Knt. Solicitor General.*

Case 485.

The King against Hull.

If judgment be given on an information against a mayor for usurpation, the Court will not afterwards grant him a *mandamus*.

MANDAMUS to swear the defendant in mayor of *Penryn* in *Cornwall*. They return, that one *Pender*, the former mayor, acted as mayor, who, though duly elected, took not the oath of office; which being found on an information, there was judgment of amotion against him; and that notwithstanding he presided at the election of the defendant, who is therefore not duly elected.

S. C. Stra. 625.
S. C. 3. Bro.
P. C. 178.
2. Ld. Ray.
1447.
Cowp. 509.

These returns ought to have the most exact certainty, and the rather because it is a doubt whether a writ of error lies (a). The return allows, and it appears by the verdict on the information, that he was well elected though not sworn. The information is set forth without saying *prout patet per record*.; after the judgment of *ouster* it is *prout liquet per record*. but the judgment might have been returned alone without the previous information. It does not appear that the issues were tried by a proper authority, it is before the justices *ad assisus capiend.* and no writ of *nisi prius* is mentioned; and justices of assize, without a writ of *nisi prius*, have no authority to try issues.

RAYMOND, Chief Justice. If there are errors in the record, the judgment is in force until reversed. The first question in the law is, If he can be sworn after *St. Matthew's Day*, being to be

(a) Paggs' Case, 11. Co. 93. See also 2 Salk. 432.

elected

THE KING
against
HULL.

electd mayor until *St. Matthew's Day*, and until another is chosen, and no direction for the time of swearing to be found in the charter? The second question is, Whether this judgment of *ouster* for not being duly sworn, though he was duly elected, hinders the party from a *mandamus* to be sworn? In cases of a *mandamus* where there appears the least right for the plaintiff, a *peremptory mandamus* must go (a). The right to the office arises from the election, the exercise of it from the swearing; he could not act without being sworn: but being removed for acting without authority, does not deprive him of his right to be sworn. A judgment of amotion may vacate an election and discharge any precedent right, but an amotion only amoves from executing the office. The whole proceeding shews he is only amoved for not having taken the oaths.

CHAPPLE *in reply*. He is, by the judgment, in an utter disability of being sworn in. It appears that the year of *Pender* is long since elapsed; all the right he had is gone by the judgment of *ouster*, which is final and absolute, not conditional. The election and swearing make but one title.

RAYMOND, *Chief Justice*. The question is, Whether the right gained by the former election is still subsisting? There were two issues on the information: If duly elected, and if duly sworn; the first found against, the other for him; and judgment of *ouster*. Whether the judgment was right or wrong we are not to determine, but must take it as it is; but it is the constant judgment on information in nature of a *quo warranto*: for though he was duly elected, he ought to shew he was qualified before he acted. This judgment is full and plain, and in the same words as a judgment of total amotion, *viz. quod P. Pender de et in prædict. &c. nullo se intromittat, sed ab eisdem et eorum quod lib. penitus excludetur et.*

POWYS, *Justice*, of the same opinion.

FORTESCUE, *Justice*. On information, an entire title and right to the franchise must be shewn; here is not an entire title, for the whole makes a title; there is judgment of *ouster*, and that very right; though if not, it ought to be reversed before we can get over it. The import of the judgment is as strong as words can express it; he is forejudged of the office, and everything belonging thereto. A man shall lose a real liberty by claiming falsely. 2. *Hen. 7. 11.* A fair was to be held one day in a week, he held it two, and so lost his letters patent in a *quo warranto*.

REYNOLDS, *Justice*. I should have had some difficulty with regard to the judgment as now entered; there are judgments of seizure *quousque*, but this is given as absolute as can be, and until reversed by error he is absolutely excluded.

MR. HUSSEY. I hope no rule shall be given, because if we reverse this judgment, such rule may not be against us.

PER CURIAM. The return is good.

(a) 2. Salk. 428. 431. Jones, 177. Ray. 431. Mod. 366.

TRINITY TERM,

The Eleventh of George the First,

I N

The King's Bench.

Sir Robert Raymond, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*
James Reynolds, Esq.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General,

Cafe 486.

Barker against Giles.

In Chancery.

A devise of lands to *A.* and *B.* and the survivor of them and their heirs, equally to be divided between them, share and share alike.

S. C. 2. Peer.

Wms. 280.

S. C. 3. Brown

P. C. 297.

ROBERT BARKER, after legacies, &c. devises all the residue of his real and personal estate to be laid out in lands to the use of *Gerrard Barker* and *Robert Barker*, the survivor and survivors of them, their heirs and assigns for ever, to be equally divided between them, share and share alike. *Gerrard Barker* died in the life of the testator; and the bill prays on the behalf of *Robert Barker*, that the real estates of the testator may be made over to him, subject to the legacies.

LUTWYCH for the plaintiff. The defendants insist, that the words "equally to be divided between them," make a tenancy in common; the consequence of which is, that *Gerrard* being dead in the life of the testator, and so the devise of his moiety being a void devise, it will descend to the defendant as heir at law. The will expressly says the estate shall go between them, which makes a jointenancy. There was a time when it was held, that a tenancy in common could not be made by will, and it was doubted in *Dyer*, 25. But in *Ratcliff's Case*, 3. Rep. it was settled that they

BARKER
against
GILES.

they could; and the reason is there given, that it was merely in regard to the intention of the party; and that intention of the party must be taken off, in the case before us, by the express direction that it shall go to the survivor. In the case of *Fisher v. Wing*, in Lord Chief Justice HOLT's time, was a surrender to sons and daughters equally, &c. and their heirs; the Judges were divided, but there Chief Justice HOLT said, that these words do not necessarily make a distinct freehold, but the intent of the parties in the will; these words only say that it shall be liable to be divided as jointenancy is. 3. Lev. 373. was cited on the other side; it is cited in *Salk.* 226. "to my two sons and their heirs for ever, and "the longer liver of them, to be equally divided between them "after the death of my wife;" held a tenancy in common. In *Salkeld*, the words "their heirs" come after the words "equally "to be divided;" but the reason there given is, that the survivor, &c. is implied in the words "them and their heirs;" and the words "equally to be divided" are of that force that they must stand, which reason I must submit to your lordship. In 2. *Roll. Abr.* 90. "equally to be divided between them, *habendum* to them "and the heirs of their bodies," held a jointenancy.

MR. COOPER *on the same side.* A will is to be construed according to the intent of the testator, expressed or necessarily implied. It is plain upon the whole will, the testator had no regard for his heir at law, and did not design he should take anything; therefore if any part come to the heir, it must be through a defect in the will. If the will, therefore, can be construed to make this a jointenancy, it is agreeable to the testator's intention. The will is not to take effect until the death of the testator, and not till then is it complete; the intention, therefore, must be collected from the circumstances at the time of the testator's death. "Equally "to be divided, &c." makes tenancy in common only in case of a will to support the intention of the testator; but this is to carry it, that they are words of such force as to destroy the intention, and to make the man die without a will as to one moiety, which he has properly devised.

MR. TALBOT *on the same side.* We are proper to apply here because it is for performance of an executory trust, to be performed by the direction of this Court, according to the intent of the testator, which was wholly to disinherit the heir at law, a very distant relation. It is impossible that the word "survivor" should have any other construction than to make a jointenancy, and with a view that one of them might die before the whole trust could be carried into execution, and in such case directs to whom the lands should be conveyed. "To them and their heirs," in point of law, is a jointenancy. "Equally to be divided, &c." has been held to govern that rule of law by intention of the testator, as being rather a stronger implication than the former. But here there is an express limitation to the survivor, which cannot be taken away
by

BARKER
against
GILES.

by implication. Jointenants "to enjoy equally," may "divide equally." 6. *Ann. Tuckerman v. Jeffrys*, "to two, to be equally divided, during their natural lives, and after the death of them two, to the heirs of one of them," held to be a jointenancy for the life of both. We are in the case of an executory trust, not of an immediate devise; for there has always been held, in articles of conveyance, a difference from the conveyance. So of covenant to make a settlement the words are carried into the intention.

WEARG, *Solicitor General, contra*. That the testator intended to disinherit the heir at law, may be said against every lapsed legacy. When one devisee died, he might intend to die intestate as to his moiety. There is no difference between an immediate limitation and a direction for a future limitation; the force of the words will be exactly the same. It rests only upon this, Whether this limitation make a tenancy in common or a jointenancy? "Equally to be divided between them," has long and often been held to make a tenancy in common. It is not reasonable to suppose the eldest should die and that his children should not be provided for, but that all should go to the youngest of the devisees. 2. *Vent.* 365. *Cro. Eliz.* 729. *Moor*, 667. Money received to the use of A. and B. equally to be divided between them, the executor of one had the moiety.

WEBBER. *Styles*, 434. "To wife for life, remainder to A. B. and C. and their heirs respectively for ever," held tenancy in common.

KING, *Lord Chancellor*. This is to be considered as a real estate, because it is to be laid out in land; and whatever estate would be created by limitation in a will at common law, will be the same at equity. The intention appearing in the will must govern the construction, and the construction cannot reject any words which may stand, and only such as are nugatory may be rejected. "Equally to be divided between them, share and share alike, if the parties live," must make tenancy in common; the words then have the same meaning though one dies; no accident can alter the meaning of the will, at the time when made. A devise to two, and one dies, the other takes, not as survivor but as devisee. The testator intended both nephews should take, as he intended to exclude the heir at law, so that one nephew should not take the whole; but if one die, there is an end of his intent as to him. By the word "survivor" the testator must intend jointenancy, as by the others tenancy in common; these are contradictions, and seem as if one set of words must be rejected. But if you make them tenants in common of the inheritance only, and make the words "equally to be divided between them" to refer to their heirs only, and jointenants for life, you take in the whole words, and make them consistent with the rules of law. The plaintiff, therefore, must take the whole for his life, as devisee; after his death, one moiety

moiety must go to his heirs and the other to the heir at law of the testator, as a lapsed legacy.

BARKER
against
GILES.

And the decree was accordingly (a).

(a) See *Bindon v. Suffolk*, 1. Peer. *Rose v. Mill*, 3. Burr. 1881. *Wilson v. Wms.* 96. *Hawes v. Hawes*, 3. Atk. *Bailey, J. Bro. P. C.* 388. 524. *Stones v. Heurtley*, 1. Vezey, 165.

Mr. Baron Price *against* Lord Coningsby.

Case 487.

Michaelmas Term, 10. Geo. 1. In the Exchequer.

IN AN ACTION ON BOND, on *oyer* prayed, the bond and condition were set forth in *hæc verba*, and amongst other things it was, that the defendant should pay such a sum to the plaintiff within two months after he came to age. Plea, that he is not come to age. Reply, that he is. Demurrer.

In debt on bond, conditioned that the defendant should pay so much to A. on his coming of age, if the defendant plead that A. is not of age, the plaintiff may reply that he is of age, without averring that the money was not paid.

KETTLERY. The exception is, that the replication should have gone on and averred that the money was paid, for that is the right of action. In the case of *Hammon v. Garrett* (a) the condition was, to account for all such monies and goods as belonged to A.; it was pleaded, that no goods came to his hands; the plaintiff replied, that a silver tankard came to his hands; and, on demurrer, the Court *seriatim* were of opinion, that there was no cause of action stated, for that they did not shew the money was not paid. In the case of an award you must shew a breach of an award, if you reply *fecit* to a plea of *nul. fecit arbitrium* (b). In the case of *Baily v. Taylor* (c), a bond was conditioned that the defendant should redeem a mortgage; the defendant pleaded "no mortgage;" the plaintiff replied "a mortgage;" and on demurrer it was held a void replication, for not averring that the mortgage was not redeemed. The condition of this bond was for the payment of several sums to the three sons of Chief Justice KELY in Ireland, within two months after they severally came to age.

COMYNS, *Serjeant, contra*. If the bond is for performance of matters contained in the condition, the defendant must shew that he has performed the defeasance, or the bond is absolute against him; unlike when the condition is for the performance of covenants. They admit by *nient dedire* that they have not paid the money, and excuse themselves by saying that James was not of age. An award is the only case in law where the plaintiff need assign any breach: if they plead no submission, reply a submission without more, and the submission is found, judgment will be with the plaintiff, because the defendant put his defence on that foot; there is no necessity to shew more than one breach. *Moor*, 591. 1. Lev. 303.

(a) 1. Saund. 102. 1. Sid. 340.

(c) Cro. Eliz. 899.

(b) Cro. Eliz. 899.

Baron

MR. BARON
PRICE
against
LORD
CONINGSBY.

Baron GILBERT. The rules for pleadings on bond are thus: A bond *prima facie* appears to be absolute, and every condition is to suspend it, the reply therefore must take away the suspension. If "*nil. award*" be pleaded, and the plaintiff reply "an award," this shews that the bond is still under suspension, and therefore the plaintiff must go further and shew a breach, that it may appear to the Court the bond is absolute. If, on a bond to perform covenants, there be a plea of covenants performed, the plaintiff must shew one that is broken to shew the condition suspended. Where there is a condition which is for the performance of a particular thing there mentioned, the defendant must shew a suspension of the condition; which is here done, that *James* is not at age. Reply, that he is at age, tenders a proper issue of that matter, to which the defendant has demurred; therefore the plaintiff ought to have his judgment.

And of that opinion were the other Barons; but, at the request of MR. KETTLEBY, it was adjourned.

Case 488. The King *against* Ashly and his Wife, and Others.

Service of notice
for attachment
for not perform-
ing an award.

MOTION for an attachment for not performing an award.—The affidavit of service was, that he shewed him the award and rule, and before they could give him a copy *Ashly* left his house, and he left a copy thereof at the door, he refusing to take the same.

THE COURT doubted if the affidavit was sufficient service, and made a rule for the defendant to shew cause.

They afterwards moved for time to next Term to serve the rule, which was granted.

Case 489.

Warren *against* Constat.

To a covenant
to transfer stock,
&c. under a mu-
tual penalty;
Quære, whether
nil debet is a good
plea.

S. C. Stra. 778.
S. C. 8. Mod.
206. 323. 382.
Ld Ray. 1500.
1. Bar. K. B. 15.

ERROR from the common pleas, in debt for two thousand eight hundred pounds on penalty, contained in articles for the sale of twenty-five shares in the *Welch Copper Company*. *Constat* covenants to transfer that stock; *Warren* covenants to accept and pay for it at the time of the transfer; and they mutually bind themselves in the penal sum. The defendant pleads *nil debet*. Demurrer, and shews for cause that *nil debet* is not pleadable.

REEVES. This is a good plea on action of debt for a penalty for non-performance of articles. The plaintiff must shew the articles, and a breach in action for a penalty, though not so upon a bond or a penal bill; therefore they are very different. An obligation with condition to perform articles is also different on the other side, for there the defendant must set out the articles and shew performance. But where the articles and bond are in the same

WARNER
against
CONSTAT.

same deed, the plaintiff must set them forth and shew a breach; then also *nil debet* is not a plea on bond: yet in this it is, because the lien does not arise merely upon the obligatory part of the deed; but on the matter in fact joined with it. By bond the defendant is estopped to say it is not a debt *prima facie*; so upon a *scire facias*, or to an action of debt upon a judgment; but must take advantage by a defeasance, which he must bring before the Court. Here is no estoppel to this plea from the deed; for the facts alleged by the plaintiff to entitle him to the action must be true. The antient and modern Books go entirely upon this reason: where matter of fact and of record are joined together, the defendant need not plead *nul tiel record*, but may plead *nil debet*. 31. Hen. 7. 14. Bro. "Issue Join." 23. 11. Hen. 7. 4. b. Payment may be pleaded to debt for rent reserved on a lease, though not to a bill obligatory, without pleading it with an acquittance. 45. Edw. 3. 4. b. 46. Edw. 3. 1. b. *Nil debet* is a good plea on an escape; 1. Saund. 38. so in debt, for not setting forth of tithes. 1. Cro. 513. Matter of record mixed with matter of fact was tried *per pais*. Hob. 244. The plea is good on covenant for non-payment of rent. 2. Keb. 347. Debt against an administrator, suggesting a *devastavit*, that debt must be on a judgment the foundation of the action; yet, the *devastavit* being necessary, *nil debet* was held to be a good plea. Michaelmas Term, 2. Ann. ——— *v. Andreus*. These are authorities in point.

DARNELL, Serjeant, *contra*. This plea is not in this case pleadable. The true difference, when it is pleadable and when not, is where the action is wholly founded on matters contained in the deed, or where it is founded on matters collateral and not arising from the deed. So is *nil debet* for rent, because there are many things arising out of the deed, as entry and expulsion, that may extinguish the rent: so in an action on an escape. Actions of debt given by act of parliament, are all given upon certain facts; and *nil debet* is a good plea: where the matter is entirely collateral, and does not arise upon the deed, it is a good plea. The case before the Court is wholly upon the deed; and it is not material if the obligation is before, or after, or mixed with the condition. Every action on a bond conditioned for payment is founded upon fact, whether the money is paid or not; but the difference is, if those facts arise out of the deed itself, as all the facts in this case do; or if they do not arise from the deed. *Nil debet* is not good in an action upon a specialty. 2. Saund. 344. Salk. 565: Hard. 332. Keilway, 47. b. 3. Lev. 170. The plea is allowed to all actions relating to the revenue, to overseers of the poor, and officers in administration of justice. The difficulty upon *nil debet* is very great on the plaintiff, for he must prove every article in the contract, and the defendant may give everything in evidence, *non compos* or other, that can be thought of in discharge; and how can the plaintiff be prepared to reply. It will be considerable in matters of cost, that he will be obliged to bring witnesses from all parts.

WARREN
against
CONSTAT.

parts. One cannot, on *nil debet*, shew that the plaintiff *nil habuit in tenementis*, but must plead it.

REEVES *in reply*. There are not authorities to support the difference which the Serjeant has laid down, where the deed contains the facts and where it does not; nor will it hold in the reason of the law, for if the facts are to be proved, it is the same in reason whether they are in the deed or not: the deed cannot ascertain the facts to be performed; that is matter *in pais*. Non-payment is not a matter of fact that is traversable or material, for although it is proved the defendant has paid the money, yet the plaintiff shall recover; it can only be pleaded in performance of the condition, which is a defeasance of the deed. The inconveniences are the same as in other cases where allowed.

RAYMOND, *Chief Justice*. There are an infinite number of cases where the defendant has pleaded specially to such contract, and none where he has pleaded generally.

THE COURT took time to advise of this case.

The judgment was affirmed in the thirteenth year of George the First (a).

(a) In Trinity Term, 8. Geo. 2. DENNISON cited this case as determined for the plea, which was allowed by *Chief Justice YORKE*, and STRANGE; and said by the Chief Justice, that the settled rule for pleading it is, where there was

a matter of fact mixed with the matter of record, to which the matter of record was inducement.—NOTE to MS. And see *Hart v. Weston*, 5. Burr. 2586. 2. Black. 683.

Case 490.

The King against Mason.

An indictment for tearing a bill of exchange is good, although no *venue* be laid to the facts of the drawing, the indorsing, or the accepting of the bill.

INDICTMENT sets forth that a note was drawn upon the defendant, that the note was indorsed over, and the defendant accepted it; and that at *St. Martin's in the Fields*, such a day, he took the note out of the hands of such a person and tore it.

GIRDLER, *Serjeant*, in arrest of judgment, took exception that there is no *venue* laid to any of the precedent facts of drawing the note, indorsing it over, or the defendant's accepting it.

REEVES. Those matters are only inducements to the offence, which is the tearing, and no *venue* is necessary to those inducements. The only matter is the trespass. If the indictment had only said *notam ipsius* the plaintiff, it would have been sufficient.

PER CURIAM. The offence is the same whether the note is described or not; there is no case to support this exception; and setting out the note specially is only surplusage. Take nothing by the motion.

The

E A S T E R T E R M,

The Thirteenth of George the First,

I N

The King's Bench.

*Sir Robert Raymond, Knt. Chief Justice.**Sir John Fortescue Aland, Knt. }**James Reynolds, Esq. }**Sir Edmund Probyn, Knt. }**Justices.**Sir Philip Yorke, Knt. Attorney General.**Charles Talbot, Esq. Solicitor General.*

Case 492.

Purfell against Purfell.

Submission
made a rule of
Court.

2. Term Rep.
643.

A SUIT was carried in the Delegates by appeal from the prerogative court, but was afterwards submitted to the determination of DARNELL and COMYNS, *Serjeants*; which submission was agreed to be made a rule of court in the *Easter Term* next following; but they stayed till the *Hilary Term* after.

RAYMOND, *Chief Justice*. It is, "that the submission be made a rule of court in *Easter Term* next;" not "so as the submission, &c." besides, you have consented to enlarge the time for making the award to *Hilary Term*.

Case 493.

Macleod against Slee.

A bill of ex-
change payable
"one month af-
ter date; as
"my half-pay
"shall become
"due," is good.

ERROR out of the common pleas, in an action on a bill of exchange: it is payable one month after date, as his (the drawer's) quarter's half-pay shall grow due.

WHITAKER, *Serjeant*. This is no more than an authority or direction to pay out of a particular fund. A bill of exchange must

be certain, and not payable on a contingency: a bill of exchange payable at seven pounds monthly out of his growing subsistence, has been held no bill of exchange (a). In that case the action was brought against the drawer, in this it is against the acceptor, but that makes no difference; the thing here is, if this is a bill of exchange. When the money was received, it might be money had and received to his use.

MACLEOD
against
SLER.

REEVES *contra*. The bill was payable one month after, and his quarterly half-pay, as appears, did not grow due until three months after date; the bill, therefore, was payable before anything was due. If a bill be negotiable, no matter on what consideration it is drawn. Where there is to be a payment out of an uncertain fund, it is not sufficient. This is not out of any fund, but absolutely payable in a month; and it appears by the bill that nothing will be in the acceptor's hands until three months after payable, and it is accepted on the credit of the drawer.

RAYMOND, *Chief Justice*. That is put in to shew the acceptor that he is safe in accepting. Suppose it was, "and give me credit," surely it had been good; the credit is given to the persons, not the fund.

FORTESCUE, *Justice*. It is an authority for the acceptor to repay himself out of the pay when it becomes due. In the cases cited the credit given is upon the fund, not upon the person.

REYNOLDS, *Justice*. It is a good bill; it is payable before the fund had any subsistence, therefore drawn on the credit of the persons (b).

PROBYN, *Justice*, of the same opinion.

PER CURIAM. Judgment affirmed (c).

(a) Jocelyne v. Lafferre, 10. Mod. 294. 316. Fort. 281.

2 Ld. Ray. 1361. Dawkes v. Deloraine, 3. Will. 207. 2. Bl. Rep. 782.

(b) 3. Will. 213.

Banbury v. Liffett, 2. Stra. 1211. Peirson v. Dunlop, Dougl. 571.

(c) See Jenney v. Herle, 1. Stra. 591.

Smith against Baily.

Case 494.

THE DECLARATION says, *quare cum Baily and How were partners, and that How made a note "for himself and partner."*

The question was, If by this note Baily is bound, for the statute says, "signed by the party, or one usually entrusted to sign notes for him."

RAYMOND, *Chief Justice*. Before the statute such signing would have bound the other partner; then the statute makes such notes as before the statute were binding, negotiable. Where a person promises for himself and company, he always signs singly; or if he promises singly, he signs "for self and company."

PER CURIAM. Judgment for the plaintiff.

F f 3

The

A note signed "for self and partner" binds the partner.
1. Salk. 126.
1. Ld Ray. 175.
1. H. Bl. Rep. 155.

Case 495.

The King against Pratt.

Conviction for cutting down trees contrary to statute 6. Geo. 1. c. 6.

See Cases in Crown Law, 378. 389.

CONVICTION for cutting down two fallows and a holly-tree on 6. Geo. 1. c. 6. which is for cutting timber and fruit-trees. On 1. Geo. 1. c. 48. it was held not punishable, unless done in the night. It is laid *circa horam nonam in nocte ejusdem diei*.

SECONDLY, They do not say they were justices at the time of the complaint; it is before them, being justices; it should be *adunc et adunc existen*.

RAYMOND, Chief Justice. There is no latitude in *circa*; and many convictions are without *adunc et adunc*: it is well enough, for it says the complaint was made to them *existen*. &c. and they *existen*. &c. convicted.

PER CURIAM. Conviction affirmed on 1. Geo. 1. c. 48.

Case 496.

Anonymous.

Suggestion for a prohibition amended.

MOTION FOR A PROHIBITION on a libel in the *Archbishop of York's* court against the *Bishop of Chester*, for not instituting *Mr. Stanley*, presented to the vicarage of *Preston*; it comes into the prerogative on a *duplex querela*.

DR. SAYER. This method does not necessarily bring the right of presentation into question: whether the bishop, by delay or neglect, has not lost his jurisdiction, is but part of the matter to be enquired; the bishop must shew cause why institution is not devolved to the archbishop, and also why he should not institute.

REYNOLDS, Justice. There may be an answer of the bishop's consistent with the spiritual jurisdiction, and his answer is not yet come in; we cannot on libel suppose the answer may be such, since it may be otherwise.

CHESSHYRE, Serjeant. The suggestion says, we have pleaded below, though on the first motion, when the suggestion was made, we had not. We now have the plea, which is, that there are two presentations; and which is right, is the question.

RAYMOND, Chief Justice. We must not countenance putting anything in the suggestion which was not then true, though it proves to be so now. You may mend your suggestion and come again.

The motion was made *super lesionem libelli*, without any mention of the plea.

Loydads

Loydads *against* Smith.

Case 497.

PLEA IN ABATEMENT to a declaration, where the defendant is said to be *nuper de Whitechapel*. Plea in abatement.

The plea is, that at the time of bringing the action he lived at *Stepney*; and the affidavit is, that he now lives in *Stepney*, and not in *Whitechapel*.

Held not good, because it should be at the commencement of the suit; but well enough on the general words in the affidavit, that the contents of the plea are true.

The King *against* The Inhabitants of Farlow.

Case 498.

THE ORDER appoints overseers "*for the year ensuing*," which the statute 43. *Eliz. c. 2.* does not direct; they are to appoint "*yearly in Easter-week, or a month after*," and then they should follow the words of the act. An appointment of overseers "*for the year ensuing*," is good.

RAYMOND, *Chief Justice*. This must be understood as the statute directs, and all appointments are.

REEVES. "For the year ensuing," must be taken according to the subject matter; the act does not direct in what manner they shall appoint.

PER TOTAM CURIAM. Well enough (a).

(a) See the case of *Rex v. J. Burder*, 4 Term Rep. 778. where an indictment alleged, that the defendant and another, being substantial householders, &c. were on the twenty-sixth of April 1791, appointed by two justices of the county to be "overseers of the poor of

"the said parish for one year then next ensuing, &c." and held good; for that these words must be understood to mean that the appointment was "for the overseers year." See also *Rex v. Sparrow*, Bost. 11. and *Rex v. Stubbs*, 2. Term Rep. 396. *notis*.

The King *against* The Mayor and Aldermen of Canterbury. Case 499.

MANDAMUS to restore *Mr. Randall* to the office of RECORDER. If a recorder be liable to removal at the pleasure of the corporation, the chusing another person recorder is a declaration of the pleasure of the corporation.

The return shews, that the charter appoints *Mr. Dubois* recorder during life, or pleasure of the mayor and aldermen or major part of them, and after death or amotion to chuse another. *Et sic toties quoties casus sic accideret*. They shew that they have chosen another, but not that they have amoved *Mr. Randall*.

TALBOT, *Solicitor General*. It is necessary that they shew an amotion before they proceed to an election; for an election of another will not amount to an amotion. And if an amotion was

F f 4

necessary,

THE KING
against
THE
MAYOR AND
ALDERMEN OF
CANTERBURY.

necessary, they do not shew that the corporation was summoned for that purpose. Though he is an officer during pleasure, he is entitled to a *peremptory mandamus*.

REEVES *contra*. They shew the election, *et perinde* that Randall was amoved, and then aver that they did amove the said Randall. An election of another is an actual amotion. 1. *Vent*, 342. They were summoned to elect another recorder, that is to amove the former.

TALBOT, *Solicitor General*, in reply. Some of the corporation would elect a new, being told that the old recorder had surrendered, who would not consent to amove. Election and amotion are two distinct acts.

RAYMOND, *Chief Justice*. Every one is supposed to know the law. An election of a new recorder is in law an actual amotion of the former, and one who comes to elect another must determine his will: to the former the case in *Ventris* seems in point.

FORTESCUE, *Justice*, of the same opinion. In these cases they may return an amotion, or an election of another; I see no difference between this and tenant at will, where the landlord may determine his will by exprefs words, or any act which is inconsistent with the estate.

REYNOLDS, *Justice*. I think, for the same reasons, that it is a good return; if an actual amotion is necessary, here is one.

PER CURIAM. *Mandamus* quashed, and the return allowed (a).

(a) See *Rex v. Thame*, 1. *Stra.* 115. *Rex v. Taunton*, *Cowp.* 413. *Rex v. Pateman*, 2. *Terin Rep.* 777.

Case 500.

Twiford against Huggins.

If the warden of the Fleet be sued by an attorney in the king's bench in an action for an escape, he may plead that he is an officer of the common pleas.

S. C. 1. Bar.
K. B. 1.

ACTION OF ESCAPE against the defendant as warden of the Fleet. Plea in abatement, that he is an officer of the common pleas, and should be sued there.

GIRDLER, *Serjeant*. The plaintiff shews in his declaration, that he is an attorney of this court; so that both courts being actually intitled to the suit, and this court thereof first possessed, ought to retain it (a).

YORKE, *Attorney General*, *contra*. Where there is privilege against privilege, it is as THE SERJEANT has laid it down; but the plaintiff must shew his privilege strictly and properly. The Court will take notice whether there is such an officer as here described; it is *un. clericor. domini regis, in curia domini regis, ad placita coram rege hic protuland. assignat.*; there is no such officer;

(a) See the Year-Book 10. *Edw.* 4. pl. 46. and 2. *Roll. Abr.* 274.

there

there is the chief clerk, but that is but one officer. This is matter in law which the Court takes notice of (a).

TWIFORD
against
HUGGINS.

GIRDLER *in reply*. By this description is meant a *filazer* (b); there is the same stile in *Rastal*, 477. if not the description of a *filazer*, yet the Court will take it to be an officer of that court, if there is one for such purpose; the stile of the chief clerk is *capital. clericor. &c.* as ours, therefore this must be taken to be one under him.

RAYMOND, *Chief Justice*. There is no doubt but where there is privilege against privilege, the first court possessed excludes the other. I remember the case of *Kirkham v. Wheeler* was not determined, but the parties agreed, and it was discontinued; *Harr's Case* (c) and several cases since have been so determined. This is no description of a *filazer*; they have no power to enroll pleas; and I know of no such officer as is described.

FORTESCUE, *Justice*. He who has priority of suit carries the privilege. There is a chief clerk that answers this character, but no other that I know. A *filazer* pretends to enroll pleas only on originals, and even that is uncertain, and has been long in dispute. He is an attorney, and might plead privilege as such. You say, you, as warden, are bound to attend; but you ought to shew that you actually did attend, for unless they do attend they are not intitled to privilege.

REYNOLDS, *Justice*. It is settled, that there is no such officer in this court; they are admitted, appointed, and surrender by the name of *filazer*.

YORKE, *Attorney General*. The warden shews himself a master in the office, not a servant to a clerk, or a servant whose attendance is not presumed to be necessary. We shew we are bound, by duty of office, to attend; the Court will not presume that he doth not do his duty.

RAYMOND, *Chief Justice*. There are several precedents, and they may soon look into them, whether they must not shew on the other side that he did not attend.

PER CURIAM. Judgment for the defendant on the other points; but to consider of the plea, if it is necessary to shew the actual attendance.

On another day it was ordered to stand over to next Term.

(a) See the case of *Kirkham v. Wheeler*, 1. Salk. 37.

(b) Co. Ent. 20.

(c) Cro. Eliz. 180.

MICHAELMAS TERM,

The Thirteenth of George the First,

I N

The King's Bench.

*Sir Robert Raymond, Knt. Chief Justice.**Sir John Fortescue Aland, Knt.**James Reynolds, Esq.**Sir Edmund Probyn, Knt.**Sir Philip Yorke, Knt. Attorney General.**Charles Talbot, Esq. Solicitor General.*} *Justices.*

Case 501.

Castle against Richardson.

The spiritual court may compel the chapel-wardens of a donative to perform such office.

S. C. Stra. 715.
S. C. 1. Bar.
K. B. 5.

REEVES. To shew cause against a prohibition to a suit in the spiritual court for not taking upon him the office of a chapel-warden, on plea that the chapel was donative, and not under the visitation of the ordinary; which plea they accepted, but admonished the defendant to take the office or shew cause. The defence is, that the chapel is a donative. A donative, in some cases, is exempt with respect to the incumbent, but the chapel-wardens are to be sworn in by the ordinary, and that court has the jurisdiction of the offices; it is not put upon an election by custom, which cannot be tried there. The only question is, Whether he shall take the office?

FAZAKERLY. The affidavit goes on to shew that we desired copies of the proceedings and were refused, which by the statute is made a ground for a prohibition.

REEVES. That is not in their suggestion.

PER CURIAM. They may amend their suggestion, but in that case the prohibition is only *quousque*.

The rule enlarged for ten days by consent (a).

(a) By *Strange* the prohibition was denied, for though there is a difference as to the incumbent in the case of a do-

native, yet they are the officers of the parish, not of the patron of the donative. Stra. 715.

Palmer

Palmer *against* Ekins.

Case 502.

PLEA to an action of covenant for non-payment of rent, that the lessor had, before the granting the lease, conveyed away the premises.

In what case a lessee is or is not estopped from pleading *nil habuit in tenementis*, in an action of covenant by an assignee of the reversion.

OBJECTION, That they shall not be at liberty to plead this after they have enjoyed the premises under the plaintiff for several years (a); besides, he has by signing the counterpart admitted the *habuit in tenementis*. This action is brought by the assignee of the lessee, yet he is privy, and the estoppel is mutual for all persons privy to the estate, and they are bound by it (b). It is with a *protestando* that the lessor *non dimisit*, which goes to the *gist* of the action; therefore ought to be pleaded, and not alledged by *protestando* (c).

S. C. Stra. 817.
3. Lev. 146.
1. Salk. 277.
Ld. Ray. 1154.
3. Term Rep. 441.

E contra. Estoppels by covenant cannot go with the land unless with the privy of estate (d). We may waive one material point by *protestando* and go to issue upon another, when both are material.

RAYMOND, Chief Justice. The plaintiff says, that J. B. seised by indenture between him and ———, demised. The defendant says, he conveyed over long before in fee, *absque hoc* that he was seised in fee. All privies shall take advantage and be bound by estoppel (e). The defendant could not have pleaded *nil habuit*, &c. then does not this plea amount to the same?

FORTESCUE, Justice. There is no occasion to reply the estoppel, where it is clear and plain as pleaded; but here it is not so, he only says that the lessor had not a fee-simple in the premises ten years before; he might have it at the time, or if not a fee, some other sufficient interest; it does not then amount to a *nil habuit*.

REYNOLDS, Justice. Where an estate in fee is set forth, it must be taken to be continuing; then this conveyance, set forth ten years before the demise, must be supposed to be at the demise, and amounts to a *nil habuit*, &c.

PROBYN, Justice. My present thoughts are, that it is an estoppel; the traverse is *absque hoc* that he is seised in fee, and makes the conveyance pleaded be tied down to the time of the demise, or else it is no plea. He has conveyed the whole estate out of him, and therefore it must be understood that he has none.

THIS CASE was argued again in *Easter Term* following.

The action is by the assignee of the lessor against the lessee for non-payment of rent. Plea, that the lessor conveyed to John Bragg before the lease granted; and traverses that the lessor was afterwards seised in fee.

(a) 1. Salk. 277.

(b) March, 64. pl. 99.

(c) Foxley's Case, Plowd.

(d) Cro. Eliz. 362.

(e) 4. Co. 53.

PALMER
against
EKINS.

FAZAKERLY. Every bar must take away the whole action of the plaintiff. The plaintiff might maintain his action if he had not a fee, but an estate in tail or for life only: this coming in upon the traverse we could not take issue upon it, but were under a necessity of taking issue upon a point which would make against them, however found, and would be immaterial. A disseisor may maintain an action for rent, if the defendant enjoy the premises; as long as any tenant enjoys his benefit, it does not lie in his power to make his landlord shew a good title. 2. *Vent.* 67. The defendant is estopped to say *nil habuit*, &c. 1. *Salk.* 277. *Cro. Eliz.* 362. This amounts to the same thing, for it cannot be a bar unless he denies the plaintiff's title to make a lease.

MR. SPELMAN. It is not an estoppel, if it may be construed not to be such. It is that on the nineteenth of *November*, ten years before the lease, the lessor conveyed to *J. B.*; so that in that time he might gain a sufficient interest to make this lease. *Nil habuit*, &c. is always said to be at the time the lease was made. If it was an estoppel, the plaintiff, who is assignee, can take no advantage, for that consists merely in action, and so not assignable. The traverse is *absque hoc* that the lessor was at any time after seized in fee; he knows his own estate best, and we are to follow him.

FAZAKERLY *in reply*. It goes expressly to the power of the lessor. The assignee may take notice of the estoppel where it runs with the reversion, as rent certainly does. Where one pleads in bar, he must take away the plaintiff's cause of action at all events.

RAYMOND, *Chief Justice*. In 1716 the lease was made to the defendant; in 1726 the plaintiff makes title by lease and release from the lessor. Assignee may take advantage of estoppel: to prevent this estoppel we must intend he had an estate for life, at least, in him after the conveyance and at the time of the lease; how shall we intend that?

FORTESCUE, *Justice*. Where the estoppel does not appear to all intents, the plaintiff must reply it; they must take away all pretence of right or title. This is only, that he had then no estate; but there is a possibility that he might at the time of the lease made.

REYNOLDS, *Justice*. I take it that it is an estoppel, it is no more than *nil habuit*, &c. We cannot intend that he has taken an estate again, after the conveyance, ten years before the lease; where there is after pleaded, we must intend it continuing; if the intentment is such, the plea must be good for nothing.

PROBYN, *Justice*. I think it an estoppel.

Curia advisare vult.

THIS CASE was argued again in *Michaelmas Term*, the second of *George the Second*.

RAYMOND,

RAYMOND, *Chief Justice*. If they declare upon an indenture *quod cum per indenturam præd. dimisit*, "*nil habuit*" cannot be pleaded; this is a special *nil habuit*, for it is that the lessor conveyed it before.

PALMER
against
EKINS.

HAWKINS, *Serjeant*. Where one puts his case on one point, he cannot after put it on another. This must be a lease passing an interest, as in the declaration; by the demurrer they admit the plea, which shews that it must operate as an estoppel, if at all. *Hob. 117. Dyer, 365. pl. 32.*

STRANGE *contra*. It was necessary for the plaintiff to deduce the title to himself as assignee. If we have no estate, there is an estoppel; if we have an estate in the premises, then we have a good title to the action.

RAYMOND, *Chief Justice*. The assignee may take advantage of the estoppel. As the plea stands, you make a nullity of the deed; in the cases cited something passed as a term on a particular estate.

REYNOLDS, *Justice*. *Nil habuit in tenementis* is not pleadable, and the reason is, that you shall not deny that he had a sufficient estate to support the interest you have out of it. He does not by demurrer admit that you have no estate, but insists that you ought not to plead such a plea. There is no difference between a general and special *nil habuit in tenementis*; if you cannot say it in one set of terms, why should you in another?

PROBYN and PAGE, *Justices*, of the same opinion.

Curia advisare vult.

In Michaelmas Term, the second of George the Second, the plaintiff had judgment (a).

(a) See *Kemp v. Goodall*, 2. *Ld. Ray.* 1154. *Salk.* 277. *Hayne v. Maltby*, 3. *Term Rep.* 441.

MICHAELMAS

MICHAELMAS TERM,

The First of George the Second,

I N

The King's Bench.

*Sir Robert Raymond, Knt. Chief Justice.**Sir Francis Page, Knt.**James Reynolds, Esq.**Sir Edmund Probyn, Knt.**Sir Philip Yorke, Knt. Attorney General.**Charles Talbot, Esq. Solicitor General.*} *Justices.*

Case 503.

Johnson against West.

In a plea of foreign attachment, to debt on bond, it must be averred that the money attached was parcel of the money mentioned in the condition.

ACTION ON BOND: To part of which tender and refusal was pleaded; to the rest, the custom of London was set forth, and that according thereto the money was ATTACHED in the defendant's hands before the day of payment in the condition; but judgment was given upon the attachment after the day in the condition mentioned. The cases all seem to be, that *debitum in presenti solvendi in futuro* may be attached, but not condemned, before the day of payment (a).

S. C. 1. Bar.
K. B. 21.

But THE COURT declined giving judgment on that point, but gave judgment *nisi* in two days for the plaintiff; it not appearing, nor being averred in the plea, that the money attached was parcel of the money in the condition of the bond, and it might be other money.

(a) Sec 1. Cro. 184. Roll. Abr. 550. 1. Sid. 357. Co. Ent. 139. Lut. 990.

Case 504. *The King against The Inhabitants of Aynhoe, Northamptonshire.*

A service under a hiring from Christmas to Michaelmas, may be

A SPECIAL ORDER OF SETTLEMENT. A person was hired from *Midsummer* to *Michaelmas*, and served that quarter, joined to a service from *Michaelmas* to *Christmas*, under a successive hiring for a year.

S. C. Fitzg. 3. S. C. 2. Ld. Ray. 1511. S. C. 2. Corft's Bott, 42. And. 63. 5. Term Rep. 100. and

and was again hired by the same master, in the same parish, to serve him from that *Michaelmas* for one year; he served to *Christmas*, three-quarters of a year, under the last hiring.

MR. PRIME. The first hiring is out of the question; then here is only a service of three-quarters of a year; and by *Salk.* 535. it must be one entire service to gain a settlement.

LEE *contra*. The statutes only require a hiring for a year in the parish; all that 8. & 9. *Will.* requires is, that there shall be a hiring for a year, and a continuance in the same service.

REEVES. These statutes have a liberal construction to gain a settlement: here was a hiring for a year, and a service for a year upon two hirings in the same place, so that the statute is complied with.

RAYMOND, *Chief Justice*. I do not understand that those acts are to be construed favourably to make a settlement, because that does an injury to another parish.

PAGE, *Justice*. Must not the service for a year commence from the hiring? I think you cannot count it to begin before the bargain.

REEVES. It was so in *Brightwell v. Hemming (a)*.

REYNOLDS, *Justice*. The parliament thought it hard that a person should hire a man for a year, and bring that man into a parish, when he could not maintain him as a servant for a year; and that such a person might hire a man, with intent and on purpose to bring him into the parish; but if he kept him as a servant for a year, and paid his wages, it was with intent only to have his service and not to intrude him upon the parish; which was one of the many frauds and contrivances the statute intended to prevent.

PROBYN, *Justice*. The old law was, that a man should be settled where born; and these laws break in upon that, therefore they are to be construed strictly.

RAYMOND, *Chief Justice*. We cannot break through this case of *Brightwell v. Hemming*, for that ought to govern, unless the words of the act were plain and clear; whereas they are loose and uncertain.

PER CURIAM. It is a good settlement (*b*).

(a) 10. Mod. 287. 1. Sess. Caf. 92. Foley, 198.

(b) See *Rex v. The Inhabitants of Adson*, 5. Term Rep. 98.

Kinerston *against* Frescobaldy.

Case 305.

IT was assigned for error, that one of the defendants in the original action, they being executors, was under age, and appeared by *attorney* when he should have appeared by *guardian*.

If one of two executors be an infant, and both appear by attorney,

the judgment is erroneous.—S. C. 2. Stra. 783. S. C. Fitzg. 1. S. C. Bar. K. B. 4. 23.

The

KINERSTON
against
FRESCOBALDY.

The question was, Whether one executor could appear by, and make attorney for himself and the other executor, who was an infant?

RAYMOND, *Chief Justice*. I am well satisfied that the question is only, Whether an infant executor can appear by attorney? The reason why they cannot make an attorney in some cases is, because they put themselves into the hands of persons against whom they have no remedy, as they have against guardians; and this court is to take care that they do nothing to their own prejudice. As executor, he cannot sue nor be sued alone. Can another do that for him which he cannot do for himself? It can be no prejudice to him, as executor, to sue by attorney, as *Tremaine's Case* is; LEVINZ says in that case, that if the defendant's executor had appeared by attorney it had been wrong, and he thinks that but an odd case, and ought not to be carried any further. *Styles*, 318. is a case in point. In this case he is as liable to suffer as if he had appeared in his own right. He is prevented trying the validity of his debt, he may be greatly prejudiced, and we are to take care that it cannot be so; this is the first case that has been attempted, and I think it error.

REYNOLDS, *Justice*. If an infant executor appear, as plaintiff or defendant, by attorney, it is error. The personal disabilities still adhere to the defendant, though there is another executor. In all cases of pleadings executors may sever, and this error cannot appear but upon a writ of error. By this the infant may be obliged to pay this debt before one of a higher nature, and he not have assets sufficient. In cases of plaintiff the infant can come to no harm.

PROBYN, *Justice*. Where their interests are the same, the executors are considered as one person; where different, as different. How can a person appear by attorney who has no power to make one?

The judgment was reversed.

Case 506.

Anonymous.

A prohibition does not lie to the spiritual court for refusing a plea proper to the jurisdiction.

Str. 777.
6. Com. Dig.
"Prohibition"
(C. 1.)

LIBEL in the spiritual court for not paying his rate to the repairs of *St. Bartholomew the Less*, near THE ROYAL EXCHANGE. The defendant pleads, that he occupies a shop in the *Exchange*, and is not a parishioner in that parish. They refused the plea; on which

STRANGE moved for a prohibition.

PER CURIAM. As it is a plea which is proper for their jurisdiction and they may try (a), if they have done wrong in refusing the plea, appeal. But denied the motion.

(a) See Rogers v. Davenant, 2. Mod. 8.

The King *against* Franklin.

Case 507.

INFORMATION FOR A LIBEL, and verdict for the king.

DARNELL, *Serjeant*, moved for a new trial. The *venire* is to try an issue between *The King and Franklin*; the issue on the information is between *The Clerk of the Crown and Franklin*; the copy delivered to us is so.

In an information, the *venire* was between *The King and A.* and the issue between *The Crown and A.*

Barnes, 18.
Bunb. 334.
1. Will. 163.

The record was right, but the copy delivered was proved by affidavit; but the copy was delivered to the defendant by his own clerk. This Term, in the case of *The King v. Hayes (a)*, there was an indictment for forging a bond, the defendant's attorney made up the record, *peroch.* for *paroch.* as was in the bond; and as his attorney made up the record, the Court would not set it aside for their own fault, but on argument mended it; which governs this case.

DARNELL, *Serjeant*, then objected, that the *disfringas* is returned, and in the addition to one of the sheriff's names it is *Mic.* for *Mil.* so that this is returned by one sheriff only, which in *London* cannot be, for two men there make but one sheriff.

If a mistake be made in the addition to one of the sheriff's names to a return of a *disfringas*, the Court will examine the sheriff as to the fact of the writ having been returned by him.

YORKE, *Attorney General*. The return is well enough. The Court will not take notice that it is not the sheriff, when two persons who have returned the writ take upon them to say they are the sheriffs. If there is any doubt with the Court, whether the sheriff did return the writ, it must be examined by the sheriff's oath in court (b). The whole that this exception amounts to is, that the *venire* was returned by one sheriff and the *disfringas* by another, which may very well be, one being in the mean time dead.

RAYMOND, *Chief Justice*. We must take them to be different persons. Suppose the person who has returned this fact is a stranger, how can they come at this fact to examine it?

REYNOLDS, *Justice*. They are two different persons. If they have an affidavit that *Tho. Loan, Mil.* who returned the *venire*, is now alive, and acts as sheriff, I think it a proper way to examine the matter; it cannot be by examination of the sheriff, for *Thomas Loan, Mic.* is not sheriff. If you could find one acting as sheriff, and of that name, it would be proper.

PROBYN, *Justice*. This fact, that the old sheriff is now alive and still acts as such, is proper for affidavit.

They prayed time to produce one.

YORKE, *Attorney General*. If you come on this fact to move in arrest of judgment, produce your affidavit to verify it immediately, it not being to the merits of the cause.

RAYMOND, *Chief Justice*. This seems to be the merits of the cause: if true, they will soon get an affidavit sworn in court.

Which was soon done.

(a) 2. Ld. Ray. 1518. 1. Bar. K. B. 142.

(b) 9. Co. 31.

THE KING
against
FRANKLIN.

YORKE, *Attorney General*. All that the statute of *York* requires of sheriffs in their return is, that they should put their names to it. A person who is a knight, when he writes himself (as sheriffs in returns are supposed to do) seldom puts the addition of "knight" to his name. If the sheriff has put the addition of "knight" to his name in the return of the *venire*, and has omitted it in the *distringas*, it is well enough, as he is not obliged to do it; then "*Mic.*" is to be rejected as nonsensical. In *Pop. 203.* the *nisi prius* was *coram Franco Harvey, Ar.* the trial *Mil.* and held it might be the same person. If, upon examination of the true sheriff, it is found that he made the return, it will be amended, though in an information; for what was amendable at common law, is now amendable in criminal proceedings.

PER CURIAM. Let *Thomas Loan*, sheriff, attend.

Cafe 508.

Carr against Goslington.

A landlord is not intitled to a year's rent out of the goods of an under-tenant.

A. LEASED to B. who leased part to C. whose goods were taken in execution. A. the first landlord, moved on 8. *Ann. c. 14.* to have one year's rent paid; but was denied, the act extending only to the next and immediate landlord (a).

(a) S. P. determined accordingly in the Case of *John Bennet, Esq.* a master in chancery, 2. *Str.* 787.

Cafe 509.

Wright against Canning.

A writ of error is not amendable where it is returnable before judgment given.

WRIT OF ERROR was returnable *Quinden. Martini*, the last return of *Michaelmas*; and the judgment was not entered up till *Octab. Hilar.* the first return of *Hilary Term*.

Strange, 807.
Id. Ray. 1530.

WELLS moved to amend the writ by altering the return to the next return day after the judgment entered up, on the statute of 5. *Geo. 1. c. 13.* on the words "or other defect" in that statute; arguing, that the statute put this writ, as to the amendment thereof, to be considered as a judicial writ, and that the returns of such were amendable.

BUT THE COURT denied the motion, for that there was nothing to amend this return by; and said, that the record was not removed by this writ, and that it was no *supersedeas*; so the defendant in error was not delayed but by his own neglect, for he might have taken out execution.

MICHAELMAS

MICHAELMAS TERM,

The Fourth of George the Second,

I N

The King's Bench.

*Sir Robert Raymond, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**William Lee, Esq.*} *Justices.**Sir Philip Yorke, Knt. Attorney General.**Charles Talbot, Esq. Solicitor General.*The King *against* Talbot.

Case 510.

ON RETURN of *habeas corpus* the warrant of commitment was set forth, which was of the defendant to the house of correction; being brought before them upon a privy search of the constable, and charged upon oath with being an idle disorderly person; which commitment did not set forth that the persons who signed it were justices of the peace, and the defendant was to be kept till the next general quarter-sessions.

Justices of the peace have power to commit idle and disorderly persons to hard labour.

EXCEPTION. If this is a commitment in execution, it has the force of a conviction, and then the justices ought to set forth their jurisdiction, that they are justices of the peace; if not in execution, it is wrong, being for a time certain, but should be until discharged by due course of law, which may be by bail or otherwise.

To the merits **IT WAS OBJECTED**, that the justices have not by the statutes power to commit a person being idle and disorderly, without an instance of wandering; and that the privy search enacted by 7. *Jac.* is repealed by 12. *Ann.* and therefore the defendant's taking being illegal, his commitment was so.

RAYMOND, Chief Justice. The 7. *Jac.* says, the house of correction is for punishment of rogues, vagabonds, and other idle

THE KING
against
TALBOT.

and disorderly persons. The privy search was one particular method by the act appointed for finding out such persons, but that hinders not, but if they are found out by any other lawful method, they might be committed, which the act afterwards implies; then that repeal of the searching method takes not away the power to commit persons brought before them upon any other. It is not necessary in the warrant of commitment to shew themselves to be justices of the peace; an adjudication is another thing. As to the time she is committed for, it is better to be certain than not. It appears they have a power, by calling her an idle disorderly person.

PROBYN, *Justice*. This is a bare commitment to the house of correction; the statute directs what is to be done with the person when there, therefore the statute makes the conviction. The time prescribed is more proper than indefinite, unless it was for such a time as appeared to be unreasonable. "Idle and disorderly person" is sufficient without shewing instances in the commitment; and they are among the persons for whom the house of correction was ordered.

LEE, *Justice*. The method before the houses of correction were appointed was, to bind them over to their good behaviour, which a constable might do, and for want of security they were committed to the county-gaol. There are no express or plain terms for committing to the house of correction, yet it is plain they have the power to commit from the use the house of correction is to be put to; and the jurisdiction of the justices arises on the whole of the act. The law makes the adjudication of what must be done with them when brought there, and their act is only a commitment, in which they are not obliged to set forth that they are justices of the peace.

PER CURIAM she was remanded.

The next day RAYMOND, *Chief Justice*, acquainted THE COURT that he had found other cases, viz. *Rex v. Symmonds*, 13. *Will.* where it was adjudged, that on 7. *Jac.* 1. justices of the peace have power to send to the house of correction; and another, *Rex v. Elderton*, where it was adjudged, that the return of the *habeas corpus* shewing they were justices of the peace helps that defect in the warrant,



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9. A parson cannot bring an action for tithes till he is inducted, *Anonymous*, 46
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1. Action on the case will not lie against the postmaster for loss of exchequer bills and letters delivered in at an under-office, *Lane v. Cotton*, 12
2. Nor will an action on the case lie against the post-master general for a bank-note stolen by one of the sorters out of a letter delivered into the post-office, *Whitfield v. Lord Despenfer*, 18 *notis.*
3. In an action on the case for digging ditches and diverting a water-course, it shall be presumed *after verdict*, that the injury was consequential, *Leveridge v. Hoskins*, 257
4. This action lies not by a carrier against his servant for losing goods, *Savage v. Walthero*, 135

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1. A. removed by certificate from B. to C. takes an apprentice, who serves out his time at C. and lives two years; he cannot be removed with his master, *St. Giles's v. Weybridge*, 204
2. If any person be bound by indenture to a certificated

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certificated person, and not afterwards having gained a legal settlement in the parish, such apprentice, by virtue of such apprenticeship, shall not gain or be adjudged to have any settlement in such parish by reason of such apprenticeship, but every such apprentice shall have his settlement in such parish as if he had not been bound apprentice to such person as aforesaid, *St. Giles's v. Weybridge*, 205 *notis*.

3. Descent of a copyhold to a certificate-man gives him a settlement, *Rex v. Parish of Burckear*, 292

CERTIORARI

1. Does not lie on the part of a defendant without special cause, *Anonymous*, 3
2. If to a writ of error on a *scire facias* against bail, the defendant plead *in nullo est erratum*, and assign the want of a *scire facias* for error, the plea is a confession of the error; but the Court may award a *certiorari* for the information of the Court, *Lawn v. Sawbridge*, 143
3. How a *certiorari* must be directed, *Reg. v. Jay*, 172
4. A *certiorari* to remove an inquisition, stating it to have been lately taken, is good, *Reg. v. Sheperd*, 271
5. Difference between a *certiorari* and a writ of error, *Reg. v. Standish*, 110
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CHEAT.

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CHILDREN.

Children born nine months after a divorce *à mensâ et thoro*, are bastards, unless the husband's access be proved, *St. George's Southwark v. St. Margaret's Westminster*, 106

CHURCH.

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CHURCH-WARDENS.

See SPIRITUAL COURT.

An action of account brought by church-wardens against their predecessors, charging them with having received several sums of money by the hands of the parishioners, without stating the sums particularly, is bad; but if there be other counts in the declaration good, the Court may abate it as to the bad counts, and give judgment *quod computent* as to those which are good, *Bishop v. Eagle*, 186.

CHURCH-YARD.

On information for brawling and striking in a church-yard, a prohibition denied, *Sawyer v. Loggin*, 200

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When a statute ousts clergy, it is only so far ousted, and only in such cases, and to such persons as are expressly comprised within the statute; for *in favorem vitæ, et privilegii clericalis*, such statutes are construed literally and strictly, *Reg. v. Whistler*, 28

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CLERK OF THE PEACE.

1. His office is a freehold, *Reg. v. Clerk of the Peace of Cumberland*, 80
2. The removal of a clerk of the peace under the statute 1. Will. and Mary, c. 21. is not a conviction but an order; and the articles must be exhibited in writing, *Rex v. Lloyd*, and *Rex v. Evans*, 80 *notis*.
3. By 1. Will. and Mary, c. 21. the *custos rotulorum* shall from time to time, where the office of clerk of the peace shall be void, nominate and appoint one able and sufficient person residing in the county, to execute the same by himself or his sufficient deputy, and to take and receive the fees, H h 2 prof.

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profits, and perquisites thereof for so long time only as such clerk of the peace shall well demean himself in his said office.

AND, if any clerk of the peace shall misdemean himself in the execution of the said office, and thereupon a complaint and charge in writing of such *misdemeanor* shall be exhibited against him to the justices in their general quarter sessions, it may be lawful for the said justices, or the major part of them from time to time, upon examination and due proof thereof, openly in their said general quarter sessions, to suspend or discharge him from the said office, *Reg. v. Clerk of the Peace of Cumberland*, 82 *notis*.

COMMON.

1. A man who claims common in another man's land, must set forth a title, *Anonymous*, 55
2. Whether trespasss may be justified by the custom of a manor for *common of vicinage*, *Bromfield v. Kirber*, 72, 73

COMMON-COUNCIL.

1. The Court will not grant an information for refusing to accept the office of common-council-man; but the corporation may, by a by-law, inflict a penalty for such refusal, *Anonymous*, 132
2. Plaintiff declared in prohibition, that he was elected and admitted common-council-man for *Tower Ward*, and that the defendant, intending to draw the examination of that election into the court of common-council, exhibited a petition for that purpose praying the plaintiff might be removed; whereas in truth the court of common-council has not any jurisdiction whatever to hear, determine, or judge concerning the election of any of the common-council, but that time out of mind the examination of such election belonged to the court of aldermen, and not to the court of common-council. The defendant pleaded, that time out of mind the common-council have had the examination of such elections, *absque hoc*, that the court of aldermen have the cognizance

and examination of such elections. The plaintiff replied, that the common-council have not, time out of mind, had the cognizance and examination; and offered an issue. But the defendant demurred, *Jeffer's qui tam v. Bolton*, 285 *notis*.

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1. A commitment by a justice of peace is in execution, *Anonymous*, 45
2. A commitment by a Lord Mayor of London on a view of a forcible detainer, subscribed "*A. B. mayor*," without adding, "*and justice of the peace*," is good; for by the statute 8. Hen. 6. c. 26. all mayors are made justices of peace, *Colonel Layton's Case*, 46, 47
3. Commitment in forcible detainer, *Anonymous*, 52
4. Commitment on *habeas corpus*, *Anonymous*, 52
5. The sessions cannot commit a man for disobeying an order of *filiation*, but must proceed on his recognizance, *Reg. v. West*, 59
6. If a justice commit a person for further examination, the officer is indictable for not carrying him to prison, although he produce the prisoner on the day of the next examination, *Reg. v. Johnson*, 62
7. Of the power of justices to commit, *Reg. v. Simmons*, 136

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1. Where notice is necessary or not, for breach of performance of a condition, *Smith v. ———*, 48
2. A difference taken by the Court between

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tween a collateral condition and a condition which runs with the land; for if a donor receive a rent with a condition to re-enter, a recovery will not bar it; *aliter* if the condition be to re-enter for non-payment of a sum in gross, *Page v. Hayward*, 61 *notis.*

3. Construction of conditions, 93
4. A bond conditioned to commit maintenance is void, 93
5. Sureties to keep the peace cannot be discharged until the condition of the recognizance is performed, *Reg. v. Lord George Howard*, 109
6. Limitation on a condition precedent of a contingent remainder, is good, *Hardwicke v. Gamball*, 119
7. If the condition of a bond be repugnant, the bond is single, *Wells v. Ferguson*, 191. 199
8. A bond conditioned, that the obligor shall remove himself and his family from a particular parish, and not return to live therein as an inhabitant without permission from the obligee, is good, *Shelton v. Sire*, 310

CONSIDERATION.

1. A sum certain is a good consideration for an uncertainty, *Squire v. Tendon*, 134
2. Covenant without consideration, *Le Neve v. Skill*, 389

CONSPIRACY.

1. Indictment for a conspiracy in charging one with being father of a child, is good, without averring that the child was in fact a bastard, *Reg. v. Bass*, 55
2. An indictment will not lie for conspiring to burthen a parish with a pauper, *Rex v. Edwards et al.* 386

CONSTABLE.

1. A constable may be indicted for "unlawfully, obstinately, and contemptuously neglecting and refusing" to make a return of what he has done under a warrant of distress directed to

him on a conviction on a penal statute, *Reg. v. Wiat*, 53

2. An inhabitant of a particular leet is not thereby exempt from serving the office of HIGH CONSTABLE of the hundred, *Reg. v. Jennings*, 215. 227
3. See also *Rex v. Genge*, 215 *notis.*
4. If a constable arrest a woman illegally as a disorderly person, and confine her in the round-house, and a person, endeavouring to release her from such confinement, suddenly, and without any precedent malice, kill a man who is acting by the command and in aid of the constable, it is *manslaughter* only, and not *murder*, *Reg. v. Tooley et al.* 242
5. The sessions cannot discharge a constable and appoint another, except on the neglect of the leet, *Rex v. Lashmore*, 380

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1. Of a court-leet, *Brock v. Hustler*, 75
2. Conveyances to uses, *Arthur v. Bokenham*, 153
3. A deed, a fine, and a recovery, but one conveyance, *Abbot v. Burton*, 184

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1. In an indictment for not executing a warrant founded on a *summary conviction*, it is sufficient to state that the party was "*in due form convicted*," *Reg. v. Pawlett*, 114
2. Conviction of forcible entry quashed for want of *manu forti*, *Reg. v. Baker*, 235
3. Conviction for cutting down trees contrary to statute 6. Geo. 1. c. 6. *Rex v. Pratt*, 402

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COPY.

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C O P Y.

In all cases where the original would be evidence if produced, and is of a *public nature*, an immediate sworn copy thereof is admissible in evidence; for as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time, 134 *notis.*

C O P Y H O L D S A N D C O P Y H O L D E R S.

1. Copyholder bound to repairs; the lord cuts his timber, *Ranger v. Ashmead*, 18
2. Difference between freeholders and copyholders, *Anonymous*, 53
3. A surrender of a copyhold "to the use of the surrenderor for life, and after his decease to the use of A. and his wife, their heirs and assigns for life; and for default of such issue, to the use of the right heirs of the surrenderor for ever," conveys an estate in fee to the husband and wife; but by such a devise they would have only taken an *estate-tail*, *Lule v. Cook*, 57, 58
4. A copyholder for life cannot cut timber-trees, *Anonymous*, 68
5. A custom for a copyholder to cut trees is void, *Anonymous*, 68
6. Whether if a copyholder die, and his wife has her free-bench, this excrescent estate do not so take away the descent, as if the son die before the estate actually came to him, that then the next heir to the father shall claim? and whether this will not make a *possessio fratris*? *Brown v. Dyer*, 70
7. If a copyhold be surrendered, and a fine assessed, but no *admittance*, the heir of the surrenderee has no title, *Brown v. Dyer*, 73
8. In what cases copyholders shall forfeit their estates, *Anonymous*, 94
9. If a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder, or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass, for he had not the fee at the time of the surrender, 130 *notis.*
10. Copyholds entailable without special custom, *Adams v. Hinkloe*, 199
11. The surrenderee of a copyhold is an assignee within 32. Hen. 8. c. 37. *Adams v. Hinkloe*, 199
12. Descent of a copyhold to a certificate-man gives him a settlement, *Rex v. Parish of Burckear*, 292
13. A person who has mortgaged a copyhold estate, is not a competent witness in an ejectment concerning it, *Anonymous*, 354
14. If a copyholder *ex parte maternâ* devise to his heir, the lands remain descendible to the heir *ex parte maternâ*, *Smith v. Trigg*, 358

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1. A coroner's inquisition can only be amended in matter of form, *Reg. v. Shepherd*, 271
2. A *certiorari* to remove an inquisition, stating it to have been *lately taken*, is good, *Rex v. Shepherd*, 271
3. The inquisition must be *super visum corporis*, *Rex v. Shepherd*, 271

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*See BURGESSES, CUSTOMS, MAN-
DAMUS.*

1. Mandamus to restore the recorder of a corporation, *Whitacre's Case*, 67
2. If a burgess totally desert the corporation, he may be removed from his office, *Reg. v. Truebody*, 75
3. A summons to attend is not necessary where a member of a corporation is not resident within the town, *Reg. v. Truebody*, 75 *notis.*

4. An

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4. An indictment stating that the defendants "unlawfully, riotously and routously assembled themselves together and hindered the members of a corporation from electing a bailiff," is insufficient, unless it shew that the defendants assembled for an *unlawful purpose*, and committed an *unlawful act*, *Reg. v. Soley et al.* 100, 101
5. Corporations by charter are generally supposed to be for the encouragement of the trade in that corporation, and consequently an advantage to the public; and must be so intended by their having a charter, which is not to be supposed to tend to a private advantage: if so, then to commit an offence against a corporation, which is acting for the benefit of trade, and by a charter, is a greater offence than the same act in the highway, which has only the protection of the Crown for the benefit of trade, without a charter, *Reg. v. Soley et al.* 102 *notis.*
6. An indictment for unlawfully and riotously entering the Guildhall of a borough, and preventing the burgesses from electing a *bailiff* of the corporation, must shew the authority of the corporation to elect such bailiff, *Reg. v. Soley et al.* 115
7. The Court will not grant an information for refusing to accept the office of common-council-man; but the corporation may, by a by-law, inflict a penalty for such refusal, *Anonymous*, 132
8. Whether, if a charter authorize a corporation to make "*all men what-soever*" free, it authorises the election of persons not belonging to the city, *Reg. v. Mayor of Hertford*, 188
9. A capital burgess cannot be disfranchised for preventing the corporation from receiving a toll pretended to be due to it by prescription, *Reg. v. Vicars*, 214
10. A freeman of a corporation disfranchised without having been *summoned*, cannot be examined as a witness in a cause for a toll claimed by the corporation, *Brown v. Corporation of London*, 225
11. Corporation shall be intended to act under the old charter, unless the contrary appear, *Rex v. Mayor of Bridgewater*, 291
12. Whether a corporation can remove a member for bribery, until he has been convicted of the offence at law, *Rex v. Mayor and Aldermen of Carlisle*, 373
13. If a recorder be liable to removal at the pleasure of the corporation, the chusing another person recorder is a declaration of the pleasure of the corporation, *Rex v. Mayor, &c. of Canterbury*, 403

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1. On discontinuance, &c. *Anonymous*, 89
2. Declaration not amendable on payment of costs, *Anonymous*, 92
3. In *assumpsit*, the executor shall pay costs, where money was received after testator's death, *Modely et Ux. v. York*, 135
4. Wherever an executor or administrator can bring an action in his own right, yet brings it as executor or administrator, and is nonsuited, he shall pay costs, 135 *notis.*
5. Discontinuance on paying costs, *Bushel v. Haynes*, 170
6. In trespass *inter alia* for breaking a lock upon a gate, there shall be no more costs than damages, unless the judge certifies, *Butler v. Cozens*, 198
7. If it appear on the trial, that the trespass, however small, was committed *after notice*, and the jury give less than forty shillings damages, the judge is bound, under the statute 8. & 9. *Will.* 3. c. 11. s. 4. to certify that the trespass was wilful and malicious, in order to intitle the plaintiff to his full costs, *Reynolds v. Edwards*, 198 *notis.*
8. If an administrator declare on two counts, one on a promise to the intestate, the other to himself as administrator, and be nonsuit, he shall pay costs for the whole, *Jones v. Wilson*, 256

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9. Any person sued in any action of debt, covenant, or any other action, or any policy of assurance, may bring into court any sum or sums of money, and if the plaintiff shall refuse to accept it with costs taxed in full discharge, and the jury shall not assents above the sum, the plaintiff shall pay the costs, *Anonymous*, 270 *notis*.
10. A pauper shall not pay costs for not going on to trial, until he is dispaupered, *Gough v. Simpson*, 277
11. Where the plaintiff shall have full costs, though the damages are under 40s. *Anderfon v. Buckton*, 303
12. Costs in error, when allowed, *Earl v. Coleman*, 307
13. A release of part of the damages does not release any of the costs given by the jury, *Cutler v. Goodwin*, 344
14. In what cases executors shall pay costs, *Jenkins v. Plome*, 174
- tenant servants, if in husbandry, *Reg. v. Cecil*, 265
6. How a covenant to pay "primage and average accustomed" shall be construed, *Markham v. Dutra*, 305
7. The breach must be as particular as the covenant, *Tibbs v. Clow*, 312
8. Covenant on articles, dated 30 Sept. assigning for breach, that the defendant "afterwards, and before the end of the term aforesaid 1 May," did, &c. is good, *Hammond v. Rogers*, 314
9. Construction of a covenant for transferring South-sea stock, *Jeffry v. Wood*, 351
10. Covenant to stand seised to the use of a stranger, in consideration of love and affection, is a bargain and sale, *Badmerin v. Pyke*, 377
11. Covenant by the heir for a breach in the time of his ancestor, *Anonymous*, 45
12. Covenant without consideration, *Le Neve v. Skill*, 389
13. To a covenant to transfer stock, &c. under a mutual penalty, whether *nil debet* is a good plea, *Warren v. Constat*, 396
14. In what case a lessee is or is not estopped from pleading *nil habuit in tenementis*, in an action of covenant by an assignee of the reversion, *Palmer v. Ekins*, 407

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See ACTION.

1. If tenant in tail covenant to stand seised to the use of himself *for life*, with remainder to the use of his son in tail, and afterwards suffer a *common recovery*, in which he is tenant to the *precept* with single voucher to other uses than those in the *covenant to stand seised*; THE RECOVERY is good, and bars the issue in tail; for the covenant to stand seised made no alteration in the estate tail, but conveyed a *base fee*, descensible only by the entry of the issue in tail, *Machel v. Clerk*, 19
2. Covenant and breach assigned after the declaration, *Rich v. Wilks*, 133
3. Submission to an award imports a covenant to perform, *Lupart v. Welfen*, 170
4. A covenant not to sue one of the obligors is no discharge as to the rest, *Fitzgerald v. Trant*, 254
5. The 5. Eliz. c. 4. extends to cove-
1. An order of two justices must shew the county in which it was made, *Anonymous*, 266
2. But it is sufficient if it be named in the margin of the order, *Anonymous*, 266 *notis*.

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1. A prohibition may be granted after sentence in all cases where it appears on the face of the proceedings, that the court below had no jurisdiction, *Anonymous*, 5
2. No recognizance lies on a *capias* in the common pleas, *Anonymous*, 45
3. Declaration for an amerciament in a court-leet, *Brook v. Hufiler*, 75
4. Seisin of James 1. in a court-leet, *Brook v. Hufiler*, 75
5. *Quære*, If the court of king's bench can give judgment where the inferior court could not, *Anonymous*, 89
6. Copy of court-roll refused by the lord, *Anonymous*, 111
7. If an inferior court has cognizance of the action, a prohibition will not lie on a suggestion that the cause of it arose out of the jurisdiction, *Anonymous*, 132
8. In the superior court the proceedings are *de novo*, and the Court takes no notice of the proceedings below, or of what preceded the *habeas corpus*; but the course is in such case to move the matter to the Court upon the *habeas corpus*, and the Court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit the Court may refuse it, *Etherington v. Reynolds*, 143
9. Whether goods taken under a writ of *levari facias*, issued by a COURT BARON upon a judgment for costs, may be sold without a writ of *executione judicii*, *Alton v. Jarvis*, 144
10. The Court will not assign counsel on an outlawry in treason until the prisoner has shewed material error, *Reg. v. Lord Griffin*, 168
11. If a defendant be acquitted in the temporal court on an information for *striking* in the church, and is proceeded against on the same cause of action in

the spiritual court for *brawling* in the church, he may plead the former acquittal in bar, although they are distinct offences, *Sawyer v. Loggin*, 200

12. If a plaintiff do not go to trial according to the practice of the Court, the defendant may have judgment, as in case of a nonsuit, *Rice v. Wilmer*, 237
13. Practice of the Court in granting an attachment, *Thomas's Case*, 284
14. In a justification under a precept from a borough court, it must be stated by what authority this court was held, *Cooper v. Darby*, 364
15. The Court will not set aside an execution on a warrant of attorney, on a suggestion of it being for money lent to a married woman and an infant, *Beaumont v. Rowland*, 367

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1. A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of a prison, though he be not there by compulsion, *Anonymous*, 4 *notis*.
2. If a creditor send his servant to receive money from a debtor, and the servant receive a banker's check, and keep it an unreasonable time until the banker fails, *quære* whether this is payment to the master? *Thorold v. Smith*, 87
3. A creditor has a right *ex debito justitiæ*, as well as the next of kin, to sue an administration bond in the name of the ordinary, 146 *notis*.
4. A creditor who pays money to his debtor's servant is not a competent witness to prove such payment in an action by the master against the servant, *Theobald v. Fregott*, 261

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1. A custom in restraint of trade is ill, *Mayor of Winchester v. Wilkes*, 48
2. A custom for a copyholder to cut trees is void, *Anonymous*, 68
3. The court of king's bench will, upon a writ of error, take judicial notice of all private customs in private places; for they below are as much bound to proceed upon the customs, as the judges in that court are upon the common law, *Anonymous*, 68
4. Whether trespass may be justified by the custom of a manor for common of vicinage, *Bromfeild v. Kirber*, 72
5. Customary descent to the younger son; *quære*, if the wife's estate for life shall break the descent to the elder, *Brown v. Dyer*, 98
6. Customary descents guided by the rules of common law, *Brown v. Dyer*, 107
7. By the custom of Kent gavelkind is devisable; and it seems that this custom is not confined to that county, *Brunker v. Cook*, 122 *notis.*
8. Of the custom of manors, 145
9. By the custom of Kent, gavelkind lands are devisable by will; but this custom will not pass gavelkind lands purchased after the making of the will, although the words are, "all such lands wherewith at the time of my decease I shall be possessed of," *Arthur v. Bokenham*, 150
10. Copyhold entailable without special custom, *Adams v. Hinkloe*, 199
11. Custom of London to sue a *feme-covert* trading as a *feme sole*, *Mrs. Poole's Case*, 253
12. A custom of the city of London, that none but free porters shall carry corn, is good, *Fitzackerly v. Wiltshire*, 351

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1. In trespass *inter alia* for breaking a lock upon a gate, there shall be no more costs than damages, unless the judge certifies, *Butler v. Cozens*, 198
2. If it appear on the trial, that the trespass, however small, was committed after notice, and the jury give less than forty shillings damages, the judge is bound, under the statute 8. & 9. Will. 3. c. 11. s. 4. to certify that the trespass was wilful and malicious, in order to intitle the plaintiff to his full costs, *Reynolds v. Edwards*, 198 *notis.*
3. The difference where you proceed in prohibition for damages, and when to maintain the jurisdiction of the common-law courts, *Bishop v. Eagle*, 263
4. A declaration in an action of assault and battery by husband and wife, stating that the defendant, on such a day, drove a coach over the wife and bruised her, by reason whereof the husband laid out divers sums of money for her cure, *et alia enormia ipsorum*, is good, though entire damages be given; for the *per quod* is only laid in aggravation, and the *alia enormia* too general to suppose damages given for it, *Todd et Ux. v. Redford*, 264
5. Where the plaintiff shall have full costs, though the damages are under 40s. *Anderjen v. Buckton*, 303
6. A release of part of the damages does not release any of the costs given by the jury, *Cutler v. Goodwin*, 344
7. Verdict set aside for smallness of damages, *Goodford v. Green*, 349
8. Promise to the intestate and a promise to the administrator joined; a *remittit damna* as to one will help it, *Tate v. Whiting*, 166
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9. Several damages but one judgment,
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2. The death of either party before the assizes is not aided by 17. Car. 2. c. 8. *Falmouth v. Stode,* 136
3. An infant must bring an appeal of death by guardian; and if it be entered in propria persona, he shall not be received, *Smith v. Bowen,* 216
4. On an appeal of death, a plea in abatement that the place at which he was stated to be commorant is misnamed, need not be verified by affidavit pursuant to 4. & 5. Ann. c. 16. *Young v. Slaughterford,* 217
5. Of the venue in an appeal of death, *Young v. Slaughterford,* 229

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1. A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of a prison, though he be not there by compulsion, *Anonymous,* 4 notis.
2. A prisoner discharged on the statute of 2. Ann. c. . and afterward arrested for a debt of above 100 l. due before the discharge, must find special bail, *Cragger v. Glover,* 36
3. If an obligee make the obligor his executor, it is a release of the debt, al-

though he dies before probate granted,
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5. Debt on judgment pending a writ of error, *Anonymous,* 70
6. In debt for an amerciamment in a court-leet, it must be shewn that the party was summoned to the court at such a day and place, *Brook v. Hustler,* 76
7. Debt lies pending a writ of error, *Anonymous,* 78
8. *Sed vide,* 78 notis.
9. If a creditor send his servant to receive money from a debtor, and the servant receive a banker's check, and keep it an unreasonable time, until the banker fails, *quære*, whether this is payment to the master? *Thorold v. Smith,* 87
10. Debt for money devised as a legacy, *Anonymous,* 91, 92
11. *Sed vide,* 92 notis.
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48. An indictment for *tearing a bill of exchange* is good, although no *venue* be laid to the facts of the drawing, the indorsing, or the accepting of the bill, *Rex v. Mason,* 398

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2. If an appeal be brought by an infant in his own person, instead of by guardian, and the appellee will not plead the infancy in abatement, the Court, on inspection of the appellant, may abate the writ *ex officio,* *ibid.* 216

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5. In dower against an infant, an admission to prosecute by his next friend is good, *Spiller v. Andrews,* 362

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3. *See* *vide* *aliter* 22. Geo. 3. c. 25. *ibid*.

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1. The stat. 13. Edw. 1. c. 34. declares, that "if a man do ravish a woman married, maid, or other, when she did not consent neither before nor after, he shall have judgment of life and member; and likewise when a man doth ravish a woman married, lady, damsel, or other, with force, although she consent after," 27
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1. If tenant in tail covenant to stand seised to the use of himself *for life*, with remainder to the use of his son in tail, and afterwards suffer a *common recovery*, in which he is tenant to the *præcipe*, with single voucher to other uses than thole in the covenant to stand seised; THE RECOVERY is good, and bars the issue in tail; for the covenant to stand seised made no alteration in the estate-tail, but conveyed a *base fee*, defeasible only by the entry of the issue in tail, *Machel v. Clerk*, 19
2. If a donor receive a rent with a condition to re-enter, a recovery will not bar it; *aliter* if the condition be to re-enter for non-payment of a sum in gross, *Page v. Hayward*, 61
3. A recovery suffered of an estate in fee simple will not alter the nature of the descent; and therefore if husband and wife, he being seised of lands in right of the wife by descent *ex parte maternâ*, suffer a recovery to themselves *for life*, with remainder *in tail*, remainder to the right heirs of the wife, with a power to the wife to dispose of the reversion *in fee*, and they die without issue, and without making any disposition

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5. Justices of the peace cannot make a conditional order of removal, *Oakham v. Whittlesea*, 171

6. If *A.* removed by certificate from *B.* to *C.* takes an apprentice, who serves out his time at *C.* and lives two years, he cannot be removed with his master, *St. Giles's v. Weybridge*, 204

7. Order to remove a man where he was bound apprentice, and served as long as his master lived, ill, *St. Alban's v. St. Botolph's*, 205

8. No person, who shall be bound apprentice by any deed, writing or contract not *indented*, being first legally stamped, shall be liable to be removed from the place in which he was so bound and has been resident forty days, by reason of such deed, writing, or contract not being *indented* only, *ibid.* 205 *notis*.

4. If a tenant in tail, with remainder in tail, levy a fine *sur consance*, &c. to *A. B.* and his heirs in order to make him tenant to the *præcipe*, without declaring the uses of the fine, the freehold vests in *A. B.*; and therefore if a writ of entry be brought against him, and he vouch the *cognizor* of the fine, the common recovery thus suffered is good.—AND NOTE, Depositions taken in Ireland may be read on a trial in England to prove the record, *Lord Altham v. Lord Anglesea*, 210

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3. But it must be pleaded; for a justification cannot be given in evidence on the general issue, *ibid. notis.*

4. On a *rescous* returned, a small fine may be imposed, *Rex v. Vaux*, 287

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2. In the admiralty court it shall be intended, after sentence, that they had jurisdiction, *ibid.* 5 *notis*.

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 "any certificated person, and not afterwards having gained a legal settlement in the parish, such apprentice,
 "by virtue of such apprenticeship, shall
 "not gain or be adjudged to have any
 "settlement in such parish by reason of
 "such apprenticeship; but every such
 "apprentice shall have his settlement
 "in such parish, as if he had not been
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3. By 35. Geo. 3. c. 101. no person shall gain a settlement by delivery and publication of notice, *St. Alban's v. St. Botolph's*, 206 *notis.*
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 8. In an action against the sheriffs of London for an escape from THE COMPTER, it is sufficient to shew, that the plaintiff levied a *plaint* against the party, and that he was charged in custody, *Jackson v. Humphreys*, 69
 9. The sheriff is liable for the escape of a prisoner committed to the gaoler, *Reg. v. Bekwood*, 80
 10. The sheriff may bring an action for an escape against a prisoner before he has paid the money, 135 *notis.*
 11. If any citizen of London, being fifty qualified, should be duly elected and chosen to be one of the sheriffs of the city of London and county of Middlesex, and should refuse to take upon him the said office (unless he should be discharged by oath as to the insufficiency of his estate, not being worth ten thousand pounds at the time of his election), he should forfeit the sum of four hundred pounds to the mayor and commonalty and citizens, to be recovered by action of debt in any of the courts of record within the city of London, *Mayor of London v. Markwick*, 164 *notis.*
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2. Sheriff cannot retake a prisoner after a voluntary escape, *ibid.* 3
3. If a sheriff levy goods under a *scire facias*, and before sale his office expire, yet the defendant cannot reclaim the goods, although the plaintiff died before the return of the writ; for the defendant is completely divested of them by the *levy*, and the sheriff, tho' out of office, may sell them without a *quodammodo exponas*; or, if he will not, he may be compelled by a *distingas*

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the day of the return of such process, such defendant shall have leave for *four days* after that return to put in good bail at the suit of the plaintiff in such process; and within that time all proceedings upon the bail-bond to the sheriff shall stay; and in case of arrest of any defendant in any other county of this kingdom, by process issuing out of this court as aforesaid, such defendant shall have leave for *six days* to put in good bail after the return of such process, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff, *Anonymous*,

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3. But see *aliter* 22. Geo. 3. c. 25.
4. An hypothecation bond given at land by the master of a vessel for necessities to supply damage done by stress of weather at sea, is good, *Johnson v. Shippin*, 30
5. Seamen employed in the river *Thames* in the outfit of a ship may sue in the admiralty for their wages, although from a disagreement between the

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2. A person who insists into the army, after verdict against him, may be taken in execution, *Mascul v. Davys*, 234
3. See also *Mason v. Vowson*, 252
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5. The spiritual court cannot entertain a libel for words reflecting on a *parson* in his profession which do not impute to him any misconduct of *spiritual cognizance*, *Clerk v. Price*, 140
6. A prohibition was granted on a libel for saying, "He has no sense, is a dunce and a blockhead. I wonder the bishop would lay his hands on such a fellow; he deserves to have his gown pulled over his ears;" because a *parson* is not punishable in the spiritual court for being a knave or a blockhead more than another man, *Coxeter v. Parsons*, cited, 141 *notis*.
7. Although the spiritual court may compel church-wardens to deliver in their accounts, yet that court cannot decide on the propriety of the charges, *Leman v. Goutly*, cited, 145 *notis*.
8. If a defendant be acquitted in the temporal court on an information for *striking* in the church, and is proceeded against on the same cause of action in the spiritual court for *bravelling* in the church, he may plead the former acquittal in bar, although they are distinct offences, *Sawyer v. Loggin*, 200
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10. Prohibition to a libel in the spiritual court for seats in the church, *Clerk v. Birch*, 290
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ing divine service and preaching without a licence from the bishop, *Dean, &c. of Westminster v. Dr. Herbert*, 315

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1. The want of a bill on the file is aided by the statute, *Anonymous*, 2 *notis*.
2. When a statute ousts clergy, it is ousted only so far, and in such cases, and to such persons, as are expressly comprised within the statute; for, in *favorem vite, et privilegii clericalis*, such statutes are construed literally and strictly, *Reg. v. Whistler*, 28 *notis*.
3. Indictment will not lie, where a statute points out a particular remedy, *Reg. v. Hurst*, 140
4. Wherever a statute creates a new offence, and prescribes a particular mode of punishing it, the method so prescribed, and not the common-law method by indictment, must be pursued, *Rex v. Marriott*, cited, 140 *notis*.
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LXXVII. THE STATUTE 11. and 12. Will. 3.

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LXXVIII. THE STATUTE 1. Ann. c. 6.

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LXXIX. THE STATUTE 2. Ann. c. .

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LXXX. THE STATUTE 3. Ann. c. 16.

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LXXXI. THE STATUTE 3. and 4. Ann. c. 9. f. 7.

1. " If any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, it shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest, according to the directions of the act, either for non-acceptance or non-payment," *Thorold v. Smith*, 72 *notis.*

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LXXXII. THE STATUTE 4. Ann. c. 16.

1. " All suits and actions in the court of admiralty, for seamen's wages, shall be commenced within *six years* next after the cause of such suits or actions shall accrue, and not after: Provided nevertheless, that if any person or persons intitled to such suit or action, shall be at the time it accrues within age, a *feme-covert*, non *compos mentis*, imprisoned, or beyond sea, he shall be at liberty to bring such action within six years after his attaining age, being *discovered*,

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- LXXXVI. THE STATUTE 12. Ann. c. 18.
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 " legal settlement in the parish, such
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 " prenticeship, shall not gain or be
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 " prenticeship; but every such ap-
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- LXXXVII. THE STATUTE 1. Geo. 1. c. 48.
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- LXXXVIII. THE STATUTE 5. Geo. 1. c. 13.
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- XC. THE STATUTE 4. Geo. 2. c. 26.
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- XCI. THE STATUTE 6. Geo. 2. c. 3.
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- XCII. THE STATUTE 6. Geo. 2. c. 14.
 Cited, *Reg. v. Soley et al.* 116 *notis.*
 See also *Dillingham v. Gately,* 237 *notis.*
- XCIII. THE STATUTE 10. Geo. 2. c. 28.
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- XCIV. THE STATUTE 11. Geo. 2. c. 19.
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XCIX. THE STATUTE 19. Geo. 2. c. 37. f. 7.

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CI. THE STATUTE 31. Geo. 2. c. 11.

1. By this act " no person who shall be bound apprentice by any deed, writing or contract not *indentured*, being first legally *stamped*, shall be liable to be removed from the place in which he is so bound and has been resident forty days, by reason of such deed, writing, or contract not being *indentured* only," 205 *notis.*
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CII. THE STATUTE 22. Geo. 3. c. 25.

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" or enter into any contract or agreement for ransoming, any ship or vessel, or any merchandize or goods on board the same, which shall be captured by the enemy: and all contracts and agreements entered into, and all bills, notes, and other securities given for such purposes are void, and the offender liable to a penalty of five hundred pounds," *Anonymous,* 6 *notis.*

CIII. THE STATUTE 22. Geo. 3. c. 64. f. 10.

Cited, *Reg. v. Apsey,* 165

CIV. THE STATUTE 24. Geo. 3. sess. 2. c. 55.

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CVII. THE STATUTE 32. Geo. 3. c. 57. f. 2.

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CVIII. THE STATUTE 34. Geo. 3. c. 61.

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